Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged have no connection at all to the state.

PARTIES TO THE PROCEEDING

Petitioners are Mobil Corporation and Honeywell International Inc. Respondents are Bruce W. Adkins and all other plaintiffs in the case styled *In Re: Asbestos Litigation*, Civil Action No. 01-C-9000, Kanawha County, as well as the Honorable Booker T. Stevens and Arthur M. Recht in their capacities as judges/special appointees of the West Virginia Mass Litigation Panel. There are approximately 8,000 plaintiffs in Civil Action No. 01-C-9000, and no caption in this proceeding identifies those individuals. Petitioners have lodged separately with the Court an unofficial list of the approximately 2,700 plaintiffs subject to the challenged trial order who have named petitioner Mobil as a defendant. (App. 40a-146a).

Petitioners before the Supreme Court of Appeals of West Virginia also included the Honorable Martin J. Gaughan, in his capacity as a judge/special appointee of the West Virginia Mass Litigation Panel (since recused and replaced by Judges Stevens and Recht, substituted as respondents here), and 117 other defendants who joined petitioners' petition for a writ of prohibition and/or mandamus.

Petitioners also have lodged separately with the Court an unofficial list of the approximately 250 other defendants subject to the challenged trial order (App. 147a-156a), as well as a list of the 117 other defendants who joined petitioners before the Supreme Court of Appeals of West Virginia (App. 157a-161a).

CORPORATE DISCLOSURE STATEMENT

Petitioner Mobil Corporation ("Mobil") is wholly owned by ExxonMobil Corporation. ExxonMobil has no parent corporations, and no publicly held companies own 10% or more of ExxonMobil's stock.

Petitioner Honeywell International, Inc. ("Honeywell") has no parent corporations, and no publicly held companies own 10% or more of Honeywell's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF CASE 1

REASONS FOR GRANTING WRIT 11

I. THE WEST VIRGINIA COURT'S HOLDING THAT MASS AGGREGATION FOR TRIAL REQUIRES NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE CONFLICTS WITH DECISIONS OF OTHER COURTS 13

II. THE WEST VIRGINIA COURT'S CHOICE-OF-LAW HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS. 21

III. IMMEDIATE REVIEW BY THIS COURT IS BOTH APPROPRIATE AND NECESSARY 26

CONCLUSION 30

APPENDICES 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 22

Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) ..... *passim*

Asbestos Information Ass'n of N. Am. v. Reich, 117 F.3d 891 (D.C. Cir. 1997) 5

Becker v. Baron Brothers Coliseum Auto Parts, Inc., 649 A.2d 613 (N.J. 1994) 18

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) 22, 23

Board of Ed. v. Superior Ct., 448 U.S. 1343 (1980) 27

Board of Ed. v. Zando, Martin & Mistead, Inc., 390 S.E.2d 796 (W. Va. 1990) 25

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 17

Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc., 808 F.2d 133 (D.C. Cir. 1987) 21

Cain v. Armstrong World Indus., 785 F. Supp. 1448 (S.D. Ala. 1992) 17

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 28

Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985) ... 18

Edgar v. MITE Corp., 457 U.S. 624 (1982) 22

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 16

Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) 14

Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) 23, 24

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) 4, 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Glussi v. Fortune Brands, Inc.,
714 N.Y.S.2d 516 (N.Y. App. 2000)..... 20

Gwathmey v. United States,
215 F.2d 148 (5th Cir. 1954)..... 14, 19

Hansberry v. Lee,. 311 U.S. 32 (1940)..... 15, 16

Hendrix v. Raybestos-Manhattan, Inc.,
776 F.2d 1492 (11th Cir. 1985)..... 15, 20

Hime v. State Farm Fire & Casualty Co.,
284 N.W.2d 829 (Minn. 1979)..... 23

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)..... 19, 20

In re Asbestos Litig., Civ. Action No. 00-Misc.-222,
slip. op. (Cir. Ct. Kanawha Cty., W. Va. Nov. 8,
2000)..... 3

In re Asbestos v. Bordelon, 726 So. 2d 926 (La. 1998)..... 4

In re Bridgestone/Firestone, Inc.,
288 F.3d 1012 (7th Cir. 2002)..... 24, 25, 26

In re Chevron U.S.A., Inc.,
109 F.3d 1016 (5th Cir. 1997)..... 14, 28

In re Ethyl Corp., 975 S.W.2d 606 (Tex. 1998)..... 20, 28

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990)..... 17

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995)..... 28

In re TMI Litig., 193 F.3d 613 (3d Cir. 1999)..... 21

Johnson v. Celotex Corp.,
899 F.2d 1281 (2d Cir. 1990)..... 15, 20

Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933)..... 21

Local 438, Constr. & Gen. Laborers' Union v. Curry,
371 U.S. 542 (1963)..... 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 15, 16, 17

Lohrman v. Pittsburgh Corning Corp.,
782 F.2d 1156 (4th Cir. 1986) 24

Madruga v. Superior Ct., 346 U.S. 556 (1954) 27

Malcolm v. Nat'l Gypsum Co.,
995 F.2d 346 (2d Cir. 1993) 14, 19

Mathews v. Eldridge, 424 U.S. 319 (1976) 27

McBride v. Galaxy Carpet Mills, Inc.,
920 F. Supp. 1278 (N.D. Ga. 1995) 23

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 16

Nicolet, Inc. v. Superior Court,
224 Cal. Rptr. 408 (Cal. App. 1986) 23

Norfolk S. Ry. Co. v. Chief Justice Warren R. McGraw,
Case Number 2:01-1238 (D. W. Va. Nov. 29, 2001) 7

Norfolk & W. Ry. Co. v. Ayers, Nos. 92-C-5829, 93-C-7004, 93-C (Cir. Ct. Kanawha Cty., W. Va.), *cert. granted*, __ U.S. __, 122 S. Ct. 1434 (2002) (No. 01-963) 26

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 5, 16

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 19

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 16, 22

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 22

Schad v. Arizona, 501 U.S. 624 (1991) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

State ex rel. Allman v. MacQueen,
551 S.E.2d 369 (W. Va. 2001) 6, 7

State ex rel. Appalachian Power Co. v. MacQueen,
479 S.E.2d 300 (W. Va. 1996) 6

Teepak, Inc. v. Learned, 699 P.2d 35 (Kan. 1985) 25

Todd-Stenberg v. Dalkon Shields Claimants Trust,
56 Cal. Rptr. 2d 16 (Cal. App. 1996) 14

TXO Prod. Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) 20

Union Pac. Res. Group, Inc. v. Hankins,
51 S.W.3d 741 (Tex. App. 2001) 14

STATUTES & RULES

28 U.S.C. § 1257 27

28 U.S.C. § 1407 6

29 C.F.R. § 1910.1001 (2001) 5, 18

W. Va. R. Civ. P. 42 5

W. Va. T.C.R. 26.01 ..... *passim*

Fed. R. Civ. P. 23 28

OTHER AUTHORITIES

Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002 4

Jennifer Biggs *et al.*, *Overview of Asbestos Issues and Trends* (Dec. 2001) 4

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001 5

TABLE OF AUTHORITIES
(continued)

Page(s)

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearings on H.R. 1283, Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999) (Prof. Christopher Edley, Jr., Harvard Law School)..... 3

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Committee on the Judiciary, 106th Cong. (July 1, 1999) (Prof. William N. Eskridge, Yale Law School)..... 28

"Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002..... 4

8 James Wm. Moore, et al., *Moore's Federal Practice* § 42.10 (Matthew Bender 3d ed. 2002)..... 19, 20

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* (Mar. 1991)..... 3

Richard L Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879 (1995)..... 17, 18

Robert L. Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1 (1997)..... 26

Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001)..... 3

Joan Steinnman, *Reverse Removal*, 78 Iowa L. Rev. 1029 (1993)..... 21

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App. 1a-19a) is reported at 563 S.E.2d 419. The concurring opinion of Justice Maynard (App. 19a-23a) is unreported. The order of the trial court (App. 24a-35a) is unreported.

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia denying petitioners' petition for a writ of prohibition and/or mandamus was entered on April 25, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The decision below approves a mass trial of thousands of product-liability cases alleging exposure to asbestos. The hundreds of defendants include premises owners, manufacturers, employers, and insurance carriers. The thousands of plaintiffs worked at hundreds of locations across the country, in different types of jobs, at different time periods spanning six decades, with different degrees of exposure and different individual health backgrounds. They were exposed to hundreds of different asbestos-containing products with different applications, instructions, and warning labels, and are assert-

ing different theories to recover for different injuries. In short, apart from the fact that their claims involve alleged exposure to asbestos, these approximately 8,000 plaintiffs have nothing in common.[1]

Under West Virginia's special mass litigation rule, Trial Court Rule 26.01, *see* App. 36a-39a, the liability of hundreds of defendants to these thousands of plaintiffs will be resolved at once. There will be no inquiry into whether that mass adjudication affords defendants a fair opportunity to defend themselves. A defendant will not, for example, have any opportunity to show that the claims against it have no logical relationship to the claims made against other defendants, or to demonstrate that the tremendous differences among defendants will be lost during a mass trial. And defendants will have no opportunity to show that particular claims have no connection to West Virginia, so that application of West Virginia law is precluded by established due process principles.

This application of Rule 26.01 exalts speed and efficiency above fundamental fairness. It turns upside down the established structure of a civil lawsuit, and allows West Virginia to impose its own asbestos solution on potential defendants nationwide. Indeed, the mere threat of these mass proceedings may well be enough to produce the desired result: with no prospect of a fair trial, defendants will face extreme pressure from the financial markets and other sources to settle thousands of claims, regardless of merit.

The constitutional problem is enormous, but the precise issues presented here are quite simple. The court below refused to conduct any inquiry into whether these 8,000 claims have enough in common that their mass trial will not unduly

[1] Eight thousand is a conservative estimate. Respondents' lawyers recently suggested that the number may be higher than 11,000. Plaintiffs' Proposed Trial Plan at 1; *see also* App. 3a n.3 (West Virginia Supreme Court noting that "we are uncertain as to the exact number of plaintiffs included in the litigation below"). Petitioner Mobil is named as a defendant in approximately 2,700 of these claims.

prejudice the defendants or confuse the jury. Contrary to the view of the West Virginia court, that inquiry is a matter of due process, not subject to override by a state trial rule. This Court has carefully mapped out the analogous constitutional limits on class actions filed in federal court. But now mass tort litigation is filed increasingly in state courts, and through vehicles other than class actions. The Court should take this opportunity to clarify that the same due process principles that prohibit standardless aggregations in federal court apply in state courts, as well.

A. The Asbestos Litigation Crisis.

1. This country is in the midst of an "asbestos-litigation crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Court recognized as much in *Amchem*, and since then, the problem has only grown worse.[2] To address burgeoning asbestos dockets, even well-intentioned courts have adopted procedural rules intended to speed resolution of claims. But those efforts have simply fueled the fire, inviting more and more claims with little regard to merit. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).[3]

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[2] The number of asbestos cases pending in courts around the nation roughly doubled from 100,000 in 1991 to 200,000 in 1999. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearings on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. 5 (July 1, 1999) (Prof. Christopher Edley, Jr., Harvard Law School). All told, the number of future claimants could reach as high as 3.5 million. *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991).

[3] West Virginia is a case in point. Early efforts to clear asbestos dockets through more modest consolidations attracted thousands of new claims, many of them from out of state. As the judge who oversaw those early consolidations ruefully concluded: "I will admit that we thought that [an early consolidation] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." *In re Asbestos Litig.*, Civ. Action

In *Amchem*, Justice Breyer observed that "'[u]p to one half of asbestos claims are now being filed by people who have little or no physical impairment.'" 521 U.S. at 631 (Breyer, J., concurring in part and dissenting in part) (internal quotation omitted). Current estimates put the number as high as 90 percent. *See* Jennifer Biggs *et al.*, *Overview of Asbestos Issues and Trends* 3 (Dec. 2001). This flood of filings by unimpaired or less impaired plaintiffs diverts resources from the truly ill claimants who need them the most – a problem recognized by lawyers who represent injured plaintiffs.[4] It also contributes to multiplying bankruptcies among asbestos defendants,[5] leading to an ever-widening search for increasingly peripheral but still solvent defendants.

Petitioner Mobil illustrates the trend. Mobil is not an "asbestos company." It neither produces nor markets asbestos, and it has no corporate relationship with any entity that does. Instead, Mobil finds itself a defendant in this action only because it used small amounts of encapsulated asbestos as a component in a line of heat-resistant coatings products manufactured between 1963 and 1980. When asbestos is encapsulated – that is, when asbestos fibers in a product are "locked in . . . bound with cement, mastic, resin, oil base or some other substance" – there is "no release, certainly no significant release, of asbestos fibers in either working areas or general air." *In re Asbestos v. Bordelon*, 726 So.2d 926, 946 (La. 1998); *see also Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1144-45 (5th Cir. 1985). Indeed, today's regulations allow encapsulated products like Mobil's

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No. 00-Misc.-222, slip. op. (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (statement of Judge A. Andrew MacQueen III).

[4] *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39.

[5] More than 56 companies have been driven into bankruptcy to date, at least 18 in the last two years alone. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12.

heat-resistant coatings to be marketed and used without warning labels. *See* 29 C.F.R. § 1910.1001(j)(6)(i) (2001); *Asbestos Information Ass'n of N. Am. v. Reich*, 117 F.3d 891 (D.C. Cir. 1997). "[T]he net has spread from the asbestos makers to companies far removed from the scene of any wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.

2. In *Amchem*, *supra*, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court acknowledged the dimensions of the asbestos problem in the courts. But even those exigencies, the Court concluded, cannot justify mass aggregations of factually dissimilar cases. In *Amchem*, the Court invalidated a proposed class-action settlement of thousands of asbestos claims, holding that it failed to satisfy the standards of Rule 23 of the Federal Rules of Civil Procedure. 521 U.S. at 629. In *Ortiz*, the Court relied on constitutional concerns as well as on Rule 23 to invalidate another proposed class-action settlement. 527 U.S. at 846.

As a result of these holdings, mass asbestos litigation, as a general rule, is no longer pursued in federal court. Nor is it often pursued through Rule 23's state-law equivalents, with their procedural protections for class action plaintiffs and defendants. Instead, efforts to aggregate massive numbers of asbestos claims in state courts now focus on the less stringent standards that govern joinder and consolidation or, as in the instant case, on special state court mass litigation rules.

B. West Virginia Trial Court Rule 26.01.

In the early 1990s, West Virginia's courts began to permit large aggregations of asbestos cases under the state's civil procedure rule authorizing consolidation under certain prescribed circumstances. *See* W. Va. R. Civ. P. 42. In 1996, the Supreme Court of Appeals of West Virginia – the

state's highest appellate court[6] – approved a mass consolidation of claims filed against 17 defendants who owned facilities located in West Virginia. *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 302 (W. Va. 1996). Following that decision, thousands of new claims flooded West Virginia's courts.

The West Virginia Supreme Court responded by invoking its constitutional supervisory powers and enacting Trial Court Rule 26.01 in 1999. *See* App. 10a. Rule 26.01 establishes a Mass Litigation Panel ("MLP") with the power to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which [is] referred to it." App. 36a. The Rule does not establish any criteria for determining when a case should be transferred to the MLP. Nor does it indicate what transfer entails: whether, for instance, suits that have been transferred are "joined" or "consolidated" with other suits, for some purposes or for all. Apart from the reference to "fair[] and expeditious[]" procedures, the Rule provides no guidance at all as to how the MLP should resolve cases referred to it.

C. Proceedings Below.

On November 17, 2000, all "asbestos-based personal injury cases in West Virginia" were referred to the MLP by order of the West Virginia Chief Justice. *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001). The next month, those pending asbestos cases were transferred to Judge MacQueen. *See id.* At the time, Mobil understood that the referral was for coordinated pretrial proceedings only, much like those authorized by the federal multidistrict litigation statute.[7] Mobil also reasonably believed that the

[6] West Virginia has no intermediate appellate courts. The Supreme Court of Appeals of West Virginia (hereinafter "Supreme Court") directly reviews the decisions of West Virginia's trial courts.

[7] *See* 28 U.S.C. § 1407(a) (allowing transfer of actions for pretrial proceedings, but requiring actions to be remanded to the districts from

presiding judge would review any proposal for consolidation or aggregation for trial purposes under established guidelines and procedures.

On May 23, 2001, Judge MacQueen entered a "master plan" permitting pre-trial discovery by both parties, in anticipation of a series of group trials containing between 20 and 100 plaintiffs each. *MacQueen*, 551 S.E.2d at 372. In July 2001, the West Virginia Supreme Court[8] rejected Judge MacQueen's plan, holding that a more expeditious approach was required. *Id.* at 375. Specifically, the court held that *all* of the thousands of pending asbestos trials should commence no later than July 1, 2002. *Id.* at 377. Invoking its supervisory powers, the court designated an additional judge to supervise the administration of the asbestos litigation, and ordered a report to the Chief Justice on the status of the case with a view toward a July 1, 2002 commencement of trial. *Id.* Three days later, Judge Martin Gaughan was appointed the supervising judge for all asbestos litigation.

On September 6, 2001, Judge Gaughan ruled that he would conduct a single "mass trial" of all asbestos claims. App. 4a-5a.[9] Over the due-process objections of petition-

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which they were transferred "at or before the conclusion of pretrial proceedings").

[8] Both plaintiffs and Mobil sought review of the master plan. Mobil argued against the so-called "small-group" trials on the ground that unrelated product-liability asbestos cases may not be aggregated for trial without a meaningful review of commonality and prejudice.

[9] Shortly thereafter, four railroad companies subject to the application of Rule 26.01 filed a § 1983 lawsuit in federal court, challenging on due process grounds the operation of Rule 26.01. The suit names as defendants the Justices of the Supreme Court as well as Judges MacQueen and Gaughan. *See Norfolk Southern Railway Co. v. Chief Justice Warren R. McGraw*, Case Number 2:01-1238 (D. W. Va. Nov. 29, 2001).

ers,[10] Judge Gaughan then entered the official "Trial Scheduling Order" ("TSO") on February 26, 2002. *Id.* 14a. Under the TSO, the mass trial, now scheduled for September 23, 2002, will resolve approximately 8,000 cases against three "groups" of defendants: manufacturers, premises owners, and employers. The first three phases of the mass trial – keyed to the three groups of defendants – will determine the fault of each defendant. The Group I trial, which includes petitioners and over a hundred other defendants, will resolve "the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor." App. 26a.

At the end of each of these three "fault" trials – but before any determination of causation or injury – the jury will consider punitive damages. For any defendant whose conduct warrants an award of punitive damages, the jury will select a "punitive damages multiplier" – that is, the number by which any subsequent award of compensatory damages should be multiplied to arrive at a punitive damages award. App. 15a. Causation and compensatory damages will be determined only after the fault phase is completed, either through mini-trials or through mini-trials in combination with a statistical matrix by which early verdicts are extrapolated to the remaining claims. *Id.* at 28a-29a.

Finally, the TSO provided for pretrial discovery by defendants and ordered plaintiffs to make certain basic "certifications," or disclosures, before the September 23 trial date: the nature of their claims, the place where they were residing when they were exposed to asbestos, and the products to

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[10] *See, e.g.*, Mobil Corporation's Objections and Request for Clarification in Response to the Court's Proposed Trial Scheduling Order at 2 (Jan. 31, 2002). Those objections were consistent with at least three previous filings—dated November 5, 2001, November 20, 2001, and December 12, 2001—before Judge Gaughan objecting to the Report. *See id.*

which they were exposed. App. 30a.

D. Decision Below.

On April 25, 2002, the West Virginia Supreme Court denied petitioners' request for relief and approved both the operation of Rule 26.01 and, in important respects, the trial plan set forth in the TSO.[11]

The court held, first, that the mass aggregation of plaintiffs' claims under Rule 26.01 is permissible even in the absence of findings regarding the risk of prejudice to defendants. The court acknowledged that West Virginia's consolidation rule – which tracks Rule 42 of the Federal Rules of Civil Procedure – requires a pretrial inquiry into whether cases set for consolidation have enough in common that there will be no undue risk of prejudice or juror confusion. App. 9a-14a & n.12. Because these cases were aggregated under Rule 26.01 rather than Rule 42, however, the court concluded that it could dispense with the standard inquiry into prejudice and confusion. *Id.* As the court summed up, Rule 26.01 has "effectively superseded" the ordinary inquiry into whether defendants' rights will be compromised by aggregation. *Id.* at 13a.

The West Virginia Supreme Court also rejected petitioners' argument that West Virginia law could not constitutionally be applied to these thousands of claims. The court failed even to address petitioners' argument that basic pretrial discovery of plaintiffs was required so that the defendants – and the court itself – could ascertain whether the claims of thousands of out-of-state plaintiffs could be adjudicated under

[11] Petitioners sought a writ of prohibition and/or mandamus, and argued against both the mass aggregation and application of West Virginia law on due process grounds. *See* Pet'rs Memo. at 21 ("The denial of [factual] findings [prior to aggregation] violates the United States Constitution"); *id.* at 26 ("United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which a state has little or no interest"). Several plaintiffs cross-petitioned for relief from the TSO discovery provisions.

West Virginia law consistent with the Due Process Clause. *See* Mobil Corporation's Response to Certain Asbestos Plaintiffs' Petitions for Extraordinary Writs at 7. Instead, the Court held expressly that West Virginia substantive law would apply during the mass trial, at least in some of its crucial phases. App. 7a (West Virginia law applies to all claims against employer defendants).

The West Virginia Supreme Court also, at plaintiffs' behest, the invoked its supervisory powers to repudiate the provisions of the TSO requiring discovery prior to the mass trial. App. 15a-16a & n.18.[12] The court declined to exercise its supervisory authority to reach two of petitioners' specific challenges to the TSO: the assessment of a punitive damages multiplier prior to determination of causation or injury, and the use of a statistical matrix to establish causation and damages as to particular plaintiffs. Because the trial court had not yet "definitively" ruled on those issues, the West Virginia Supreme Court held, review would be premature. *Id.* at 15a.

The court acknowledged that Rule 26.01 and the mass trial procedure do not "perfectly address[]" the problem of asbestos litigation, and that a congressional solution would be "far preferable." App. 11a-12a. But Rule 26.01 and its implementation by the trial court "represent the judicial system's best efforts to address the unique challenges of managing this voluminous litigation, while at the same time trying to afford substantial justice to all the parties involved in a timely manner." *Id.* at 12a. The court closed by making clear that no further pretrial review would be forthcoming: "[W]e fully intend to allow the supervising judge to continue to fashion and implement various trial management plans

[12] Three days after the West Virginia Supreme Court issued its decision, Judge Gaughan amended his TSO accordingly, effectively precluding any discovery by defendants prior to the September 23 mass trial and narrowing significantly the scope of the required certifications. A later order barred Mobil from pursuing any written discovery regarding any of the plaintiffs.

without further intrusion by this Court." *Id.* at 18a.

Judge Maynard wrote separately to describe his "profound disquiet." App. 19a.[13] Citing *Amchem* and *Ortiz*, he argued that the proposed mass trial likely would deny petitioners due process – and that "some federal court will eventually tell us so." *Id.* Of particular concern was the due process problem that would be raised by application of West Virginia law to claims of "as many as five thousand" plaintiffs with "NO connection whatsoever with West Virginia" but who have "migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." *Id.* at 22a (emphasis in original). With these reservations, Judge Maynard nevertheless concurred in the decision below, in part because he believed review would be premature, *id.* at 19a, and in part because he could see no "simple" alternative for resolution of West Virginia's asbestos claims, *id.* at 23a.[14]

REASONS FOR GRANTING THE WRIT

As this Court has made clear, regardless of the exigencies created by the asbestos-litigation crisis, courts are not authorized to abandon the fundamental rights of litigants. Here, the courts of one state – West Virginia – have undertaken to impose on rest of the nation a "legislative" solution that no legislature, state or federal, has enacted. That solution is to combine all plaintiffs and all defendants into one massive proceeding regardless of the number of parties involved, and without any attention to the particulars of any individual plaintiff or defendant – and then to apply West Virginia's

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[13] Judge Maynard reserved the right to file a concurring opinion when the West Virginia Supreme Court issued its decision on April 25, and filed his concurrence separately on July 5, 2002.

[14] After the West Virginia court issued its decision, Judge Gaughan was recused from the proceedings and replaced by Judges Booker Stevens and Arthur Recht. The trial is still scheduled to go forward in the form approved by the West Virginia Supreme Court in the opinion below.

substantive law without any analysis of whether all of those claims have the constitutionally necessary connection to the state. The Due Process Clause of the Fourteenth Amendment does not permit this unprecedented and profound distortion of the processes of civil justice.

To be exact, the Due Process Clause does not permit the joinder for a mass liability trial of thousands of disparate asbestos cases against hundreds of defendants in the absence of any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking. The decision of the West Virginia Supreme Court to dispense with any determination of commonality and prejudice directly conflicts with cases from other courts recognizing that due process and fundamental fairness require courts to determine whether common questions of law or fact permit aggregation, and whether aggregation will unduly hinder a party's right to defend itself in a multi-party proceeding.

Nor is West Virginia free simply to apply its law to all claims joined through a mass litigation rule without allowing for a determination of whether the underlying complaints have any connection to the state. On this point, the decision below is in clear conflict with decisions of this Court setting outer constitutional limits on the application of a forum's law, and also with cases from lower courts acknowledging and applying those limits.

The pre-trial and trial processes for this mass endeavor raise a number of constitutional questions of the utmost seriousness. Some of these questions are premature for this Court's review;[15] others – those raised here – are decidedly

[15] Petitioners do not now seek review, for instance, of the assessment of a "punitive damages multiplier" prior to any determination of causation or injury, or of the use of a statistical "matrix" to extrapolate findings of causation and injury. But even those provisions of the TSO have an immediate effect: hanging over the proceedings like a sword of Damocles, they help to coerce the very mass settlements that may permanently insulate them from judicial review. *See infra* at 28-30.

not premature. Indeed, for the questions in this latter category, this is the only meaningful opportunity for federal review. Post-trial review may well be impossible: the stakes may simply be too high for a defendant to proceed to a mass trial in which it will have no real opportunity to defend itself.

I. THE WEST VIRGINIA COURT'S HOLDING THAT MASS AGGREGATION FOR TRIAL REQUIRES NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE CONFLICTS WITH DECISIONS OF OTHER COURTS.

Holding that Rule 26.01 is not "affected by case law interpreting various rules of civil procedure," App. 4a – including the rules governing joinder, class actions, and consolidations – the Supreme Court of West Virginia approved an aggregated trial of 8,000 plaintiffs against hundreds of defendants without subjecting it to review under any standard at all. The Court expressly held that the ordinary consolidation standard – requiring sufficient commonality to avoid an undue risk of prejudice or jury confusion – is "superseded" by Rule 26.01. But Rule 26.01 establishes no criteria of its own for aggregation of cases, nor any guidance for treatment of cases referred to the MLP. In short, the decision below not only permits, but specifically approves an entirely standardless aggregation of thousands of asbestos claims.

1. That decision is in clear conflict with decisions of the United States Court of Appeals for the Second and Fifth Circuits, and with appellate decisions in two of the nation's largest states, California and Texas. Those courts have required a judicial determination that a proposed aggregation does not combine cases so factually dissimilar that it would unduly interfere with a party's right to litigate its own claims or defenses. And, importantly, that determination is deemed necessary not only as a matter of civil procedure, on which there is room for jurisdictional differences, but as a matter of due process and fundamental fairness, on which there is not.

The Second Circuit has made clear that review of a proposed consolidation for commonality and risk of prejudice is required by the Due Process Clause. *See, e.g., Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (invalidating consolidation order pretrial where it would "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result"); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing consolidation of 48 asbestos cases because the "benefits of efficiency can never be purchased at the cost of fairness"). The Fifth Circuit applies the same rule. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidating, pretrial, proposed trial plan in mass consolidation under Due Process Clause); *Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (consolidation precluded where deprives litigants of due process right to "fair opportunity to have [their cases] determined from the evidence in reasonable proceedings").

Appellate courts in California and Texas also have recognized that overbroad consolidations of factually dissimilar claims may contravene due process limits as well as ordinary rules of civil procedure. *See, e.g., Todd-Stenberg v. Dalkon Shields Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996) (recognizing that consolidation of disparate claims can cause confusion and prejudice to the point of depriving defendants of due process); *Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741, 749 (Tex. Ct. App. 2001) (due process violated in aggregated proceedings unless defendants have "opportunity to adequately and vigorously present any material claims and defenses").

The issue on which the decision below conflicts with these other authorities – the constitutional necessity for review of commonality and potential prejudice – has direct and important consequences. In courts in which this review is required, the result is substantial and meaningful limits on

the number and types of cases that may be consolidated for trial. Those courts routinely hold that asbestos cases may be consolidated for trial only when they involve – at a minimum – common worksites, similar occupations, similar exposure times and similar injuries. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (analyzing and upholding consolidation of two asbestos claims for trial); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495-96 (11th Cir. 1985) (approving consolidation of four asbestos claims after concluding that workers with same injuries and same jobs were exposed within the same time frames and at many of the same job sites). It is only by forgoing that inquiry altogether, by contrast, that the court below could approve the aggregation for trial of 8,00[illegible] wildly disparate asbestos claims against 250 defendants.[16] In short, the outcome in this case would have been different had the case arisen in any of the majority of jurisdictions that recognize a due process limit on the aggregation of cases for trial.

2. This Court should grant the petition on the basis of the conflict among the lower courts alone. But it is also clear that on the merits, the court below erred in holding that state courts are free to dispense with any review for prejudice and confusion when aggregating asbestos cases.

a. States possess considerable flexibility in creating rules of civil procedure, but that flexibility is ultimately constrained by the Due Process Clause. *Hansberry v. Lee*,. 311 U.S. 32, 40-42 (1940); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("because minimum [procedural] re-

[16] The initial referral of all "asbestos" cases to the MLP in November of 2000 is no substitute for the standard due process inquiry. *Cf.* App. 13a (relying on initial determination that these cases can "be grouped together for trial purposes"). Contrary to the suggestion of the West Virginia Supreme Court, that one-time administrative referral did not constitute a determination that the cases would – or could, constitutionally – be litigated together in a mass trial, and accordingly did not include the appropriate review for commonality or potential prejudice and jury confusion.

quirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate") (citation omitted).[17] Of special relevance here, the Court has on several occasions invalidated state rules of civil procedure when they afford individuals affected by mass litigation inadequate protections. *See Hansberry*, 311 U.S. at 40-42; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Due process limits on state authority to aggregate cases for trial protect important interests of both plaintiffs and defendants. First, due process principles ensure that before they are bound to the outcome of a mass proceeding, plaintiffs receive notice of the action, *see Eisen*, 417 U.S. at 176, and are adequately represented at trial, *see Hansberry*, 311 U.S. at 41-42. Indeed, it was primarily concerns about the adequacy of representation – in light of substantial factual disparities among plaintiffs – that caused the Court to invalidate the proposed class-action settlements in *Amchem* and *Ortiz*. *See* 521 U.S. at 625; 527 U.S. at 856.

Though these principles apply directly to plaintiffs, defendants – like petitioners here – have an equal stake in their proper application. Defendants have an obvious interest in ensuring that any judgment in an aggregated proceeding binds all the plaintiffs in the future and, in this sense, the requirements of notice and adequate representation protect *defendants* by affording them some measure of finality at the close of a mass proceeding. *See Shutts*, 472 U.S. at 809-10 (defendants have standing to allege deficiencies in notice and representation); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

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[17] The same supremacy principle applies to state constitutional provisions. The fact that the West Virginia Constitution mandates the administration of justice without delay, *see* App. 12a (citing W. Va. Const. art. III, § 17), in other words, cannot justify expedited proceedings that fall short of the federal due process standard.

Due process limits on aggregation also safeguard the rights of defendants more directly. The commonality requirement ensures that a defendant forced to deal with several plaintiffs at once is in fact defending only against a single and narrowly presented legal situation. That precaution is doubly important in cases like this one, involving not only multiple plaintiffs but also multiple defendants. Without a careful inquiry into commonality, the proceeding may easily become so large and confusing that it is impossible for each defendant to present a meaningful defense: evidence inadmissible as to one defendant may be admitted as to others, *see Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992), and the complexity of the proceedings may make it impossible for the jury to sort through the evidence and various defenses to tailor a verdict to each party's culpability, *see Logan*, 455 U.S. at 433 (due process guarantees "the aggrieved party the opportunity to present his case and have its merits fairly judged"); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (improper aggregation unfairly allows plaintiffs to litigate on behalf of composite "perfect plaintiff," combining strongest aspects of unrelated claims).

This case amply illustrates the wisdom of those constitutional limits. The single common element in the 8,000 claims massed for trial is that the word "asbestos" appears in each complaint. The thousands of plaintiffs have been "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some [plaintiffs] suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis or from mesothelioma." *Amchem*, 521 U.S. at 624 (quotation omitted); *see also* App. 22a (Maynard, J., concurring). It is obviously not the case that all 8,000 of the plaintiffs will be "actually before the court" in anything "more than a fictional sense." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990); *see also* Richard L.

Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 892 (1995) ("consolidation can leave claimants with as little control over their cases as unnamed class members in a class action"). But there has been no inquiry – nor will there be – into whether each of these very differently situated plaintiffs will or can be adequately represented at the mass trial.

On the defendant side, the mass trial approved below will make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way. The Group I mass trial includes over a hundred defendants, each of which manufactured or distributed a different asbestos-containing product or products. Petitioner Mobil alone manufactured a number of distinct products between 1963 and 1980. Mobil's products were applied in small amounts, such as through use of a putty knife to seal cracks in coatings on boilers or to cover small nail holes. And all of Mobil's products – unlike many other defendants' – entirely encapsulated small amounts of chrysotile asbestos within other materials.[18] There is no scientific evidence that *Mobil's* products can cause asbestos-related diseases or illnesses.

Nevertheless, Mobil's liability will be assessed in conjunction with that of over a hundred other manufacturers, distributors, and alleged conspirators: those who made products

[18] The term "asbestos" – the only thing these cases have in common – actually refers to a range of minerals with significant variations among them. "Asbestos" is the name given to a whole "class of magnesium-silicate minerals that occur in fibrous form. Minerals that are included in this group are chrysotile, crocidolite, amosite, tremolite asbestos, anthophyllite asbestos and actinolite asbestos." *See* Occupational Safety & Health Standards, 29 C.F.R. § 1910.1001, App. G. (2001). "[A]sbestos products are not made from the same formula, come in various forms and carry different risks of harm." *Becker v. Baron Brothers Coliseum Auto Parts, Inc.*, 649 A.2d 613, 621 (N.J. 1994) (citing *Mullen v. Armstrong World Indus., Inc.*, 246 Cal. Rtpr. 32, 36-37 (Cal. Ct. App. 1988)); *see also Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985); *accord Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985).

before and after Mobil, those who had knowledge of the dangers of their products, and those whose products exposed workers to great risk of asbestos-related illness. Evidence concerning the alleged knowledge and conduct of all these other defendants will be admitted into the mass proceeding, where it will almost inevitably tar petitioners, as well. *Gwathmey*, 215 F.2d at 154 (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). And the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the jury, making it impossible to distinguish one defendant or defense from another and to render a fair verdict on petitioners' unique defenses. *Malcolm*, 995 F.2d at 352 (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).[19]

b. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (state civil trials must operate "according to the settled course of judicial proceedings"); *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'"). Against this benchmark, too, the procedure approved by the West Virginia Supreme Court comes up short.

Traditional practice in both federal and state courts is to review for commonality and prejudice before cases are aggregated for trial. *See, e.g.*, 8 James Wm. Moore, et al.,

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[19] Contrary to the West Virginia Supreme Court's supposition, this constitutional problem cannot be obviated by careful specification of the issues put to the jury at the close of the mass trial. *See* App. 15a. The problem inheres in *any* effort to have a single jury determine the "fault" of hundreds of differently situated defendants in relation to thousands of disparate plaintiffs.

Moore's Federal Practice § 42.10[4]-[5] (Matthew Bender 3d ed. 2002); *Johnson*, 899 F.2d at 1284 (reviewing cases); *In re Ethyl Corp.*, 975 S.W.2d 606, 612-15 (Tex. 1998) (same); *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516, 518 (N.Y. App. 2000) ("[W]here prejudice to a substantial right is shown . . . a joint trial should not be granted even if common issues of law or fact exist."). And in asbestos cases specifically, common practice is to aggregate "five or fewer claims at a time" – and those only on a stringent showing of common or similar worksites, occupations, periods of exposure, alleged injuries, and the like. *In re Ethyl Corp.*, 975 S.W.2d at 612. Federal courts – and the majority of state courts that model their rules after the Federal Rules of Civil Procedure – agonize about the consolidation of two, *Johnson*, 899 F.2d at 1285, four, *Hendrix*, 776 F.2d at 1495-96, thirteen, *Cain*, 785 F. Supp. at 1451, and even twenty-two, *In re Ethyl Corp.*, 975 S.W.2d at 615-17, asbestos claims for trial. A consolidation for trial of *8,000* claims against *250* defendants "so departs from [the] accepted norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion).

The decision below also departs from traditional practice by approving a method of aggregation – what the court below termed "conjoin[der]," App. 10a – that is otherwise unknown to civil litigation. Indeed, the West Virginia Supreme Court expressly held that this mass trial proceeding is unconstrained by any of the traditional state rules that govern aggregations, *see supra* at 9 – apparently without considering whether these traditional ways of proceeding might now set the constitutional baseline. *See Oberg*, 512 U.S. at 430 ("abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").

Traditionally, consolidation may not operate to abridge the rights that parties would have if their cases proceeded

separately. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (consolidation does not "merge the suits into a single cause, or change the rights of the parties"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 808 F.2d 133, 135 (D.C. Cir. 1987); *In re TMI Litig.*, 193 F.3d 613, 724-25 (3d Cir. 1999). But the "conjoinder" approved below clearly alters the substantive rights of the parties: all "asbestos" claims are automatically referred to the MLP, and defendants are denied any opportunity to conduct standard discovery necessary to file standard pretrial motions (i.e., motions challenging venue or motions for summary judgment) in order to weed out frivolous or non-meritorious claims.

Departures from prevailing practice and traditional rules should be particularly suspect in this context. In cases ranging from *Hansberry* to *Amchem* and *Ortiz*, this Court has recognized the critical importance of the traditional protections that attend class-action aggregations. Those protections will be rendered meaningless if state procedural innovations, like the West Virginia "conjoinder," operate unchecked by traditional aggregation rules and standards. Whatever the label affixed by the state, a mass aggregation that implicates the rights of plaintiffs to adequate representation and the rights of defendants to a fair opportunity to defend should be accompanied by the traditional protections – including the standard judicial inquiry into commonality and risk of prejudice and jury confusion. *See, e.g.*, Joan Steinnman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1042 (1993) (noting concern that mass consolidations lack the "procedural safeguards that due process and codified rules demand in class actions of similar magnitude").

II. THE WEST VIRGINIA COURT'S CHOICE-OF-LAW HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS.

Petitioners argued below that without pretrial discovery, defendants have no opportunity to prove that West Virginia

law may not be applied to thousands of claims with no connection to the state. Without addressing this argument directly, the West Virginia Supreme Court held that West Virginia law will be applied to determine the fault of at least one group of defendants. App. 7a. Justice Maynard, on the other hand, focused extensively on the constitutional problems raised by any effort to apply forum law to all of the claims at issue, thousands of which have no meaningful connection to West Virginia. *Id.* at 21a-22a ("All the due process arguments are compelling, but this [choice-of-law] is the due process claim about which I am most fearful of eventual reversal.").

1. The choice-of-law decision below conflicts with the express dictates of this Court, as well as with the decisions of lower federal courts applying those rulings. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815 (1985), this Court held that the mere fact that a defendant does business in a state does not justify application of that state's law to claims that have no other "apparent connection" to the state. Instead, a state may apply its law consistent with the Due Process Clause only if it has a "significant" connection to the claims asserted by *each* plaintiff – even in the context of a nationwide class action, in which it "may be more difficult or more burdensome to comply with [these] constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum." *Id.* at 821-22. *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion) ("if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional" under Due Process Clause).[20] As Justice May-

[20] Constitutional provisions other than the Due Process Clause also limit a state's ability to regulate or proscribe conduct having no relationship to that state. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion) (Dormant Commerce Clause); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (same); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) ("principles of state

nard put it in his concurring opinion, "The United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which [it] has little or no interest." App. 21a.

The decision below, forgoing any inquiry into the existence of contacts sufficient to justify application of forum law, cannot be reconciled with the precedent of this Court. *See* App. 22a (Maynard, J., concurring) ("Because so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the *Phillips* case, I just don't see how the trial court can tread safely through this judicial minefield."). Not surprisingly, it also conflicts with decisions from lower courts faithfully applying this Court's case law. In aggregated proceedings in which injuries have accrued nationwide, courts routinely engage in an "individualized choice of law analysis" with respect to each plaintiff's claims, *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and apply forum law only if they can confirm that each claim has the necessary "significant contact" with the forum state, *see Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408, 414-15 (Cal. Ct. App. 1986) (applying due process choice-of-law analysis to individual claims); *Hime v. State Farm Fire & Casualty Co.*, 284 N.W.2d 829, 831-32 (Minn. 1979) ("slight and casual" contacts insufficient to justify application of forum law consistent with due process); *see also McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278, 1285 (N.D. Ga. 1995) (*Phillips* requires application of law of state in which each plaintiff resides, rather than forum law).

The failure of the West Virginia Supreme Court to engage in an analysis of "significant contacts" under *Phillips* has dramatic consequences for this case. Thousands of the

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sovereignty and comity" dictate "that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states").

claims at issue involve plaintiffs who reside in *and* were allegedly exposed to asbestos in states other than West Virginia. *See* App. 21a (Maynard, J., concurring) ("as many as five thousand of the plaintiffs included in the [] mass trial are not West Virginia residents and were never exposed to asbestos in this State").[21] Even Judge Gaughan has recognized as much, taking "judicial notice" of the fact that "there is a long history of massive filings on behalf of non-West Virginia residents having no exposure to asbestos in West Virginia." Order on Certain Defendants' Motions to Dismiss Out-of-State Plaintiffs, May 6, 2002, at 4. Even a cursory analysis under *Phillips* would have made plain the constitutional impossibility of applying West Virginia law to these claims. *See Georgine*, 83 F.3d at 627.

Nor could the constitutional problem be avoided by postponing until trial a determination of what law should be applied.[22] The 8,000 plaintiffs in this case reside in and were allegedly exposed to asbestos in as many as 35 different states. Whenever the *Phillips* inquiry is undertaken, it will result in application of the laws of all or most of those various states – making a mass trial of all 8,000 claims even more confusing and unmanageable, and hence unconstitutional, than it otherwise would be. *See, e.g., In re Bridge-*

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[21] Because no discovery of plaintiffs has been permitted, it is impossible to identify the precise number of plaintiffs without connection to the state.

[22] In fact, of course, the West Virginia Supreme Court already has expressly approved application of West Virginia law at trial, at least as to some defendants. And all defendants are currently held to West Virginia law with respect to substantive pretrial motions and defenses. For instance, under the laws of many of the states in which plaintiffs reside, a defendant could prevail on summary judgment unless each plaintiff could make a sufficient showing that he or she was exposed to the particular defendant's products. *See, e.g., Lohrman v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986) (Pennsylvania law). That state-law standard has been replaced here by West Virginia law, which allows cases to proceed directly to trial even in the absence of such a showing.

stone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (Easterbrook, J.) (commonality inquiry screens for situations in which "claims must be adjudicated under the law of so many jurisdictions" that aggregated treatment becomes impossible). Indeed, this seems to be precisely the scenario that Justice Maynard had in mind when he expressed his considerable doubt that a mass trial could be held consistent with *Phillips* and the Due Process Clause. App. 21a-22a.

2. The question of whether and under what circumstances a state may apply its own law to cases that accrue throughout the nation is exceptionally important. Without some limit on a state's authority to apply its own law, particular state courts can become magnets for resolution of critical national issues. The result is the worst kind of forum-shopping – and effective authorization for those states to impose their policy choices on the rest of the country.

State product-liability laws reflect fundamental decisions about how best to protect citizens from defective products, regulate the state economy, and structure the judicial system. There is no reason to think that one state's policy judgments will be the same as or consistent with those of other states. West Virginia, for instance, is among the distinct minority of states that has retained the doctrine of pure joint and several liability in product-liability cases. *See Board of Ed. v. Zando, Martin & Mistead, Inc.*, 390 S.E.2d 796, 799 (W. Va. 1990). That is West Virginia's prerogative. The problem arises when West Virginia seeks to apply its own law to claims that arise exclusively in other states – states that have rejected pure joint and several liability as fundamentally unfair to defendants. *See, e.g., Teepak, Inc. v. Learned*, 699 P.2d 35, 39 (Kan. 1985) ("There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.").[23]

[23] This Court recently granted review in *Norfolk & Western Railway Co. v. Ayers*, Nos. 92-C-5829, 93-C-7004, 93-C (Cir. Ct. Kanawha Cty.,

Joint and several liability is just one example; there are countless other aspects of product-liability law and policy that differ substantially from state to state. *See* Robert Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1, 9-10 (1997) (describing conflicting state policy choices regarding premises' owners liability, comparative fault, liability for emotional distress, and foreseeability). West Virginia should not be permitted, through mass proceedings like the one approved below, to impose its policy preferences on thousands of claims with no meaningful connection to the state. Whatever efficiencies might result would be far outweighed by the cost to fundamental principles of federalism. *See In re Bridgestone/Firestone*, 288 F.3d at 1020 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.").

III. IMMEDIATE REVIEW BY THIS COURT IS BOTH APPROPRIATE AND NECESSARY.

The fact that one or a few state courts have adopted a legal standard that conflicts with the law in other courts does not always warrant immediate Supreme Court review. But this case does. In combination, the two holdings below – allowing mass aggregation of claims without any review for commonality and potential prejudice, and allowing for wholesale application of West Virginia law – mean that a single state jurisdiction may become the repository for enormous numbers of cases arising throughout the nation. Indeed, West Virginia is well on its way to becoming just such a magnet for mass filings – making it increasingly unlikely that other states will ever face the same issues raised here. Under these circumstances, even a single outlier state can have nationwide impact, and even a relatively one-sided con-

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W. Va.), *cert. granted*, __ U.S. __, 122 S. Ct. 1434 (2002) (No. 01-963), in part to consider the closely related question of whether West Virginia properly applies its own state-law rule of joint and several liability to claims arising under the Federal Employers' Liability Act.

flict requires resolution by this Court.

The two precise questions raised by petitioners are fully ripe for review by this Court. The Supreme Court of West Virginia has approved a standardless aggregation of thousands of claims for trial without any inquiry into commonality or potential prejudice, and it has decided to apply West Virginia law without engaging in a *Phillips* choice-of-law analysis. These two questions are cleanly and squarely presented by the holdings of the West Virginia Supreme Court, and no further factual development is required. And though petitioners have made every effort to obtain relief from the West Virginia courts, the West Virginia Supreme Court has held that it will not revisit these two questions, App. 18a, leaving review by this Court as the only remaining avenue for protection of petitioners' fundamental rights.

There is no question but that the decision below is a "final" decision over which this Court has jurisdiction under 28 U.S.C. § 1257. A petition for a writ of mandamus or a writ of prohibition filed before the highest court of a state is a "distinct lawsuit that is 'fully and finally determined' even if 'further proceedings are to be had in the lower court.'" *Board of Educ. v. Super. Ct.*, 448 U.S. 1343, 1345-46 (1980) (quoting *Fisher v. Dist. Ct.*, 424 U.S. 382, 285 n.7 (1976)); *see also Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257.").

Finally, though interlocutory review is generally disfavored as a prudential matter, that presumption does not apply when postponing review might be the equivalent of denying review altogether – when, that is, "crucial collateral claims" might be lost if they are not reviewed immediately. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also Local 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). This is just such a case.

Post-trial review of mass aggregations is effectively unavailable, as the "paucity of appeals challenging trial settings of multiple [consolidated] claims" attests. *In re Ethyl Corp.*, 975 S.W.2d at 610-11. Given the enormous potential liability that mass aggregations pose for defendants, combined with scrutiny from financial markets, aggregated proceedings exert powerful pressure on defendants to settle even meritless cases. Aggregation may raise the stakes of litigation to the point where a defendant simply cannot risk trial, regardless of the merits, thus opening the door to what are effectively "blackmail" settlements. "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (same); Fed. R. Civ. P. 23(f), advisory committee notes (providing for interlocutory review of class certification decisions because certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

The settlement pressure exerted by mass aggregation is especially pronounced when – as in this case – the underlying claims assert potentially serious personal injuries. In *In re Chevron*, which involved an aggregation of 3,000 personal-injury claims against a single defendant, the Fifth Circuit concluded that the decision to aggregate would "probably not [be] effectively reviewable after trial. The pressure on the parties to settle in fear of the result of a perhaps all-or-nothing . . . trial is enormous." 109 F.3d at 1022. Outside observers increasingly agree. *See, e.g., The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong. (July 1, 1999) (Prof. William N. Eskridge, Yale Law School) ("Especially in state courts, defendants in the typical [asbestos] jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to

plaintiffs.").

And those are just the settlement pressures exerted by the standard mass aggregation. The pressure for settlement here is made even more intense by the ever-present threat of especially Draconian measures like "punitive damages multipliers" assessed against defendants even before they are shown to have caused any injury, and findings of ultimate liability based not on trial but extrapolation from a statistical matrix. Such measures are, to put it mildly, of dubious constitutionality. But so long as they remain on the table – and the West Virginia Supreme Court has kept them there, by refusing to use its robust "supervisory" power to evaluate their permissibility – they inevitably work to extort pretrial settlements.

Indeed, all of the parties to the West Virginia litigation fully understand the coercive pressures at work. Lawyers for the plaintiffs argued against Judge MacQueen's original small-group trial plan on the express basis that it would not impose "enough leverage on [defendants] to cause them to settle a thousand cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. March 16, 2001), Transcript of Hearing at 72-73 (statement of James F. Humphrey). The West Virginia courts themselves have relied on the certainty that the planned mass trial will provoke mass settlements – in order to explain why the mass trial will not be as hopelessly sprawling and confusing as it now appears. *See* App. 5a. It is one thing to take account of the possibility of settlements driven by external factors in planning an aggregated trial. But it is something else entirely when the anticipated settlements are driven by the mass trial proceeding itself, so that the coercive nature of a mass trial becomes its own justification.

As a practical matter, this may well be the only opportunity defendants like petitioners will have to bring their claims before the Court. It may also be the Court's best opportunity to clarify the limits imposed by the Due Process Clause on mass aggregations in state courts. Under circumstances like

these, immediate review is entirely appropriate. Indeed, it is essential.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

No. 30314

STATE OF WEST VIRGINIA EX REL. MOBIL CORPORATION; CCX, INC.; DRAVO CORPORATION; GREAT LAKES CARBON CORPORATION; GREEN TWEED & COMPANY, INC.; LIMBACH, INC.; PITTSBURGH METALS PURIFYING COMPANY; PLIBRICO COMPANY; ROBERTSON CECO CORPORATION; SEEGOTT, INC.; ZURN INDUSTRIES; GENERAL ELECTRIC COMPANY; MONSANTO COMPANY, NKA PHARMACIA CORPORATION; COMBUSTION ENGINEERING, INC.; CERTAIN DEFENDANTS AND CERTAIN PREMISES AND EMPLOYER DEFENDANTS; FORD MOTOR COMPANY; DAIMLER CHRYSLER CORPORATION; AND GENERAL MOTORS CORPORATION, Petitioners

v.

HONORABLE MARTIN J. GAUGHAN, IN HIS CAPACITY AS A JUDGE/SPECIAL APPOINTEE OF THE WEST VIRGINIA MASS LITIGATION PANEL; AND ALL PLAINTIFFS IN THE CASE STYLED IN RE: ASBESTOS LITIGATION, CIVIL ACTION NO. 01-C-9000, KANAWHA COUNTY, Respondents

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PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

WRIT DENIED

Submitted: April 2, 2002
Filed: April 25, 2002

The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision of this case.
JUDGE JOHN T. MADDEN, sitting by temporary assignment.
JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Per Curiam:

Petitioner Mobil Corporation[1] seeks extraordinary relief from a February 26, 2002, Trial Scheduling Order[2] entered by the Circuit Court of Kanawha County, entered in connection with certain asbestos-based personal injury cases that have been amassed under West Virginia Trial Court Rule ("TCR") 26.01. Mobil argues that the procedures contemplated by the lower court in connection with bringing the asbestos cases to trial will, as a matter of certainty, result in a denial of its Due Process rights if trials ensue under the outlined, but as yet unfinalized, trial procedures. Upon our full review of this matter, we do not find that Mobil has met the requirements for entitlement to either a writ of prohibition or a writ of mandamus. Accordingly, the requested writs for extraordinary relief are hereby denied; however, due to the inherent complexities involved with the management of these asbestos cases, we proceed to set forth certain observations and cautionary concerns for the trial court's consideration and use.

I. Procedural Background

This matter arises in connection with the grouping of presumably several thousands[3] of asbestos personal injury

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[1] Various other defendants have joined with Mobil in seeking relief from the trial court's orders of September 6, 2001, and February 26, 2002, relative to both pre-trial and trial matters.

[2] At the time Mobil filed its petition, the Trial Scheduling Order had not yet been entered. Mobil was initially seeking relief from the September 6, 2001, Report of the trial court relative to this litigation.

[3] Consistent with our earlier observation in *Allman*, we are "uncertain as to the exact number of plaintiffs included in the litigation below." 209 W.Va. at 728 n. 1, 551 S.E.2d at 371 n. 1. During oral argument of this matter, however, one of plaintiffs' counsel represented to the Court that the trial group currently is made up of 7,715 cases if the FELA cases are included, and 5515, if those cases are excluded.

claims under the provisions of TCR 26.01. In addition to addressing the propriety of these cases proceeding under TCR 26.01 in *State ex rel. Allman v. MacQueen*, 209 W.Va. 726, 551 S.E.2d 369 (2001), we outlined a fourteen- point directive for the trial court in connection with the management of these cases. *See id.* at 732-35, 551 S.E.2d at 375-378. However, before those directives could be fully implemented, Mobil sought relief from this Court[4] in connection with the trial court's intent to use a mass trial format, the prospective application of various trial groupings, and the use of certain measures for calculating damages. Much of the relief sought by Mobil was previously considered and rejected in the *Allman* decision. For example, Mobil previously raised the argument, which we rejected, that both Rule 42 of the West Virginia Rules of Civil Procedure and the cases construing that rule were controlling. *See Allman,* 209 W.Va. at 731, 551 S.E.2d at 374 (noting that "[b]ecause the provisions of TCR 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting various rules of civil procedure, including Rules 20, 23, or 42, which respectively address issues of joinder, class action, and consolidation").

At the time Mobil filed its petition for relief in late December 2001, the only ruling that had been issued by Judge Gaughan was a "Report," which was entered on September 6, 2001. As an initial matter, Judge Gaughan concluded that "because of the very complicated intertwining of plaintiffs' attorneys, multiple defendants and their defense attorneys, varying exposures to asbestos and different theories of liability, it is futile to continue to pursue small all-issues trials over a long period of time as contemplated by the current

[4] Mobil filed its motion seeking extraordinary relief on December 21, 2001, and we issued a rule to show cause on January 23, 2002.

trial schedule."[5] After discussing the use of mediation to resolve these cases and indicating that mediation would be addressed through a separate order[6] and would be scheduled to occur between October 1, 2001, and March 4, 2002,[7] Judge Gaughan provided for a June 24, 2002, mass trial date. Under the trial plan described in the Report, three judges and three juries would be convened for the purpose of resolving "issues that are common to all or almost all of the parties." Following this initial phase of trying common issues, the trial court contemplated at the time of the September 6, 2001, Report that "additional juries w[ould] be picked to try the issues of exposure/causation and damages." Based on the history of previous mass trials, Judge Gaughan anticipated that "through the elimination of parties during the mediation and the jury trial process . . ., the number of litigants would be drastically reduced within two months of the initial verdict on liability." At such time, the trial court speculated that it might attempt to use a damage matrix for purposes of the un-

[5] The "current trial schedule" referenced by Judge Gaughan was the schedule originally set by Judge MacQueen with certain modifications indicated by this Court through our decision in *Allman*.

[6] Judge Gaughan entered two additional orders on September 6, 2001, each of which concerned mediation of the asbestos cases pursuant to Trial Court Rule 25. A separate order governed the "railroad" asbestos cases, while all other asbestos personal injury claims were subject to a general order of mediation. Under the general mediation order, the plaintiffs were directed to submit within 120 days of the order's entry certain information to the asbestos registry or be barred from participating in the mediation process outlined in the September 6, 2001, mediation order. The information required for the registry was essentially identifying information relative to an individual's work and health history, as well as product identifying information concerning the respective plaintiff's exposure history.

[7] This Court is unaware of how many, if any, asbestos cases were resolved through the mediation process.

resolved cases.[8] Appreciative of both the potential unworkability of or the need to completely discard the matrix concept, Judge Gaughan stated that "it is the intention of the Court to continue to try cases to jury verdict until there are no unresolved trials." After discussing the use of a unified numbering system for documents and a method for dealing with previously-ruled upon motions, Judge Gaughan ended the Report by observing that "the trial plan has not been solidified."[9]

In late December 2001, Mobil sought relief from this Court based on the approach outlined by Judge Gaughan in the September 6, 2001, Report. Mobil asked this Court to vacate the September 6, 2001, ruling on the grounds that the trial court's decision to "consolidat[e] thousands of unrelated individual asbestos personal injury claims into a single trial was arbitrary and capricious" and that such decision denied Mobil its right to Due Process and Equal Protection. Mobil challenged the trial court's refusal to conduct evidentiary hearings on the issue of whether these claims could be grouped together and still provide a fair determination of the issues presented, as well as the contemplated use of a punitive damage matrix. Mobil further alleged that the trial court was thwarting its "efforts to secure review" by "failing to set forth specifically the procedures to be used in the consolidated trial."

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[8] See *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (upholding use of statistical matrix for damage calculations on Due Process challenge).

[9] Judge Gaughan further indicated in the September 6, 2001, Report that it was "intention to continue to work with Judge MacQueen and others experienced in the trial of asbestos litigation to develop a process which will eliminate the need for repetitive discovery depositions, interrogatories, requests for admissions, etc."

In response to Mobil's request for relief and the rule to show cause, Judge Gaughan issued the February 26, 2002, Trial Scheduling Order. In that order, the trial court further developed some of the ideas outlined in the September 6, 2001, Report. To illustrate, the trial court provided additional details regarding the format to be used at the September 23, 2002, trial.[10] Three simultaneous trial groupings are to proceed simultaneously, with the object of determining issues solely related to the fault of the various defendants. The trial groupings represent, in generalized fashion, the various causes of action alleged by the plaintiffs: (1) product liability claims; (2) premises liability claims; and (3) deliberate intent causes of action asserted under West Virginia Code § 23-4-2 (1994) (Repl.Vol.1998). The scheduling order indicates that interrogatories will be submitted to the three juries to permit individualized findings of liability for each defendant. After the liability trials have been completed, new juries will be selected for mini-trials that will be convened to resolve issues of causation and damages. Under the plan outlined in the scheduling order, an unspecified number of plaintiffs will be involved in the mini-trials "against their common defendants." The trial scheduling order further provides that the "preferred manner of addressing the causation and damages issues will be to break down into manageable groups based on causes of action, geographic locations, and similar exposure criteria." At the start of the mini-trials, each trial judge will read the verdict form from the liability trials, including all special interrogatories, and the jurors will be advised that they are bound by those findings of liability, leaving for their resolution issues solely involving causation and damages. With regard to the possible use of a matrix, Judge

[10] The earlier selected mass trial date of June 24, 2002, was postponed due to the complexities involved in getting these matters to trial.

Gaughan indicated that "a workable plan for utilizing a matrix is not before the court, and there is no need to take evidence on the use of a matrix until at least the scheduling conference for the causation and damages mini-trials."[11]

Mobil seeks relief both from the September 6, 2001, Report and from the February 26, 2002, Trial Scheduling Order.

II. Standard of Review

While Mobil styled its petition alternatively as either a writ of prohibition or a writ of mandamus, we choose to treat the petition as a writ of prohibition given the nature of the relief sought by Mobil. Our standard of review for writs of prohibition that do not involve issues of jurisdiction was announced in syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impres-

[11] The trial court further stated that by the time of the scheduling conferences for the mini-trials it anticipated that it would "be able to ascertain the necessity of implementing such a matrix based on the type of cases and the number of plaintiffs and defendants remaining in the action."

sion. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Against these principles, we consider whether the relief sought by Mobil meets these standards for issuance of a writ of prohibition.

III. Discussion

A. Ranson Findings

We first address the procedural argument that Mobil reasserts in contending that the lower court has committed error by not making certain findings that are commonly referred to as the *Ranson* findings.[12] Although this Court clearly rejected this argument in *Allman,* we take this opportunity to discuss why *Ranson* findings are not required in matters proceeding under TCR 26.01. *See Allman,* 209 W.Va. at 731,

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[12] "The trial court, when exercising its discretion in deciding consolidation issues under W.Va.R.Civ.P. 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties, and avoid prejudice and confusion." *Syl. Pt. 2, State ex rel. Appalachian Power Co. v. Ranson,* 190 W.Va. 429, 438 S.E.2d 609 (1993).

551 S.E.2d at 374. When we ruled upon the petition seeking extraordinary relief in *Allman*, we determined that our jurisdiction to address the issues raised therein concerning a litigation management plan issued in connection with these same asbestos cases arose by virtue of "our constitutional supervisory power over the court system as a whole." *Id.* We chose to address the issues raised in *Allman* under those general supervisory powers due to the "absence of any explicit judicial review provided under TCR 26.01 for matters that are proceeding under the mass litigation provisions set forth in that rule." *Id.*

Unlike the earlier asbestos cases that were tried *en masse* in Kanawha and Monongalia Counties, and are known as Kanawha Mass I-IV and Mon. Mass I and II, the procedural posture of *Allman* was unique in that the cases were not combined as a result of the provisions of Rule 42 of the West Virginia Rules of Civil Procedure. Because the earlier tried mass asbestos cases preceded the promulgation of TCR 26.01, which went into effect on July 1, 1999, those cases proceeded under traditional principles of consolidation pursuant to the provisions of Rule 42. In marked contrast to those previously consolidated asbestos cases, the cases involved in *Allman* were combined under the authority of TCR 26.01. To invoke TCR 26.01, Judge MacQueen and the Honorable Arthur M. Recht submitted petitions to this Court in which the grounds for grouping the cases together as "mass litigation" under the rule were fully set forth. Upon review of those grounds and upon satisfaction that the cases had the necessary criteria for proceeding under the provisions of TCR 26.01, then Chief Justice Maynard entered an order on November 17, 2000, granting the request to conjoin these cases under the mass litigation trial court rule.

To fully understand the genesis of TCR 26.01 requires an

appreciation of the fact that the earlier mass asbestos cases - Kanawha Mass I-IV and Mon. Mass I and II - gave both the trial courts involved in those cases, as well as this Court, insight into the unique considerations that arise with mass tort suits involving common factual scenarios and/or theories of causation. *See State ex rel. Appalachian Power Co. v. MacQueen*, 198 W.Va. 1, 5, 479 S.E.2d 300, 304 (1996) (noting that due to Congressional lack of action, the courts have been forced "to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets"). Through the experience of those earlier cases, various constructs emerged regarding how to balance the right of the parties to have access to the judicial system in a reasonably prompt fashion without simultaneously grinding the court system to a halt to the detriment of all other matters. *See, e.g., id.* at 5 n. 8, 479 S.E.2d at 304 n. 8 (discussing alternative management techniques employed by state and federal courts for asbestos litigation). Perhaps the most important lesson that was learned from those earlier mass asbestos cases is that the management of these cases cannot be accomplished without granting the trial courts assigned to these matters significant flexibility and leeway with regard to their handling of these cases. *See id.* at 6, 479 S.E.2d at 305 (recognizing importance of granting trial courts "broad authority to manage its docket with regard to asbestos cases"). A critical component of that required flexibility is the opportunity for the trial court to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system. Out of this need to deal with "mass litigation" cases in non-traditional and often innovative ways, TCR 26.01 was drafted and adopted.

While we do not suggest that TCR 26.01 perfectly ad-

dresses the entirety of the issues that arise in conjunction with the handling of mass litigation claims,[13] we conclude that this rule, as well as the implementing efforts of the trial courts and this Court, represent the judicial system's best efforts to address the unique challenges of managing this voluminous litigation, while at the same time trying to afford substantial justice to all the parties involved in a timely manner. We further observe that TCR 26.01, by sanctioning mass litigation, seeks to meet the constitutional mandate of administering justice without delay. *See* W.Va. Const. art. III, § 17. As many courts and commentators agree,[14] it would have been far preferable for Congress to have authorized the development of a compensation system for asbestos claims that could have, in an administrative manner similar to the workers' compensation system or federal black-lung cases, addressed redress for victims of asbestos exposure and injury, at least in the first instance. Due to the lack of any such alternate recovery mechanism, however, the state and federal judiciaries throughout this country have been forced, by default, to accept the "managerial nightmare" of dealing with, or being inundated by, an inestimable and seemingly endless number of asbestos cases. *Allman*, 209 W.Va. at 731, 551 S.E.2d at 374.

While we recognized in *MacQueen* that the trial court's latitude in managing asbestos cases was to be "controlled

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[13] Nor do we think that any one rule could both contemplate and effectively address all the potential issues that arise with mass litigation.

[14] See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (stating that asbestos litigation "calls for national legislation"); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (recognizing that in 1991 the Judicial Conference Ad Hoc Committee on Asbestos Litigation had called for "federal legislation creating a national asbestos dispute-resolution scheme").

only by measuring that authority against the four part test of *Ranson*," the adoption of TCR 26.01 has effectively superceded the requirement that the *Ranson* factors be used in all mass trial cases, especially where, as here, the cases proceed independent of the consolidation mechanisms set forth in Rule 42.[15] 198 W.Va. at 6, 479 S.E.2d at 305. In seeking to have the trial court go back and make *Ranson* findings, Mobil overlooks the fact that the purpose of those findings was only to make the *initial* determination of whether the cases should be grouped together for trial purposes. With the adoption of TCR 26.01, the determination of the need to group cases as "mass litigation" for trial purposes is made through a process that operates in a fashion distinct from the steps previously specified in *Ranson*. Intrinsic to the adoption of TCR 26.01 and its use is an initial finding by this Court of both the need to group cases as "mass litigation" for trial purposes and the appropriateness of conjoining the cases for trial purposes based upon common factual and/or legal issues. Because this Court has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance. We are long past the initial determination, which was reached by this Court in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes. Accordingly, we reject Mobil's contention that the trial court is required to make *Ranson* findings[16] in this case before it proceeds further.

Like our consideration of the petition in *Allman*, our re-

[15] See W.Va.T.C.R. 26.01(g) (providing that TCR 26.01 does not "affect the authority of a circuit judge to act independently under the provisions of" Rule 42).

[16] See supra note 13.

view of Mobil's petition arises in connection with our constitutional authority to supervise the court system as a whole. *See Allman*, 209 W.Va. at 731, 551 S.E.2d at 374. And, while we agree with the recognition in *MacQueen* that trial courts must have broad latitude in managing these asbestos cases, we emphasized in *Allman* that the trial court's actions must reflect consideration of and be in accord with the procedural and substantive due process rights of the parties. *See* 209 W.Va. at 730, 551 S.E.2d at 373. Accordingly, our consideration of the issues raised in Mobil's petition is driven by an overarching concern that the trial court's management of these asbestos cases does not operate in a fashion inimical to the parties' Due Process rights and basic notions of fundamental fairness. *See id.*

B. Trial Scheduling Order

We have carefully reviewed Judge Gaughan's February 26, 2002, order, which is designed to bring these cases to trial over the next few months through the use of the above-discussed bifurcated process. We wish to make clear that Judge Gaughan's decision to enlarge the time frame for trying these cases that we set out in *Allman* was well-justified. *See* 209 W.Va. at 733-34, 551 S.E.2d at 376-77. We consider the adjustment of the time frame to be in accord with our instruction in *Allman* that the trial court should organize and bring these cases to trial with appropriate concern for fundamental fairness and Due Process. *See* 209 W.Va. at 730, 551 S.E.2d at 373. In that same spirit, we observe that the trial court has authority to make additional time frame modifications to the February 26, 2002, scheduling order as it deems necessary and/or required to meet the legitimate needs of the parties, provided that such alterations do not thwart this Court's concern that these cases be resolved in as prompt a fashion as possible to meet the Constitutional directive of

administering justice "without . . . delay." W.Va. Const. art. III, § 17.

The trial court's decision to begin the bifurcated trial process by initially resolving issues of liability and subsequently convening "mini-trials" to address the remaining issues of causation and damages is consistent with past mass trial practices in this state. Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation, Mobil's contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature. We cannot, in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations.

Likewise, we cannot substantively address Mobil's concerns regarding the potential use of a matrix, or a punitive damage multiplier, because the trial court has not yet definitively ruled upon the use of either of these mechanisms. Accordingly, any consideration of these issues at this time would be clearly premature. The trial court's announcement to postpone, for the time being, any decision regarding the potential use of a matrix underscores the precipitous nature of ruling on this issue at this juncture. Matters such as a matrix and the use of a punitive damage multiplier, given the unresolved nature of the use of such mechanisms, can be better addressed by this Court upon appeals taken from final orders.

We perceive that the trial court will recognize and accommodate the legitimate limitations of the parties with regard to strict adherence to various parts of the scheduling order and will make certain adjustments to the time periods

specified in the current order.[17] For example, discovery deadlines may need to be adjusted to reflect both the realities of scheduling logistics and the need to focus initially on obtaining information pertinent to the common issues phase of the litigation with subsequent discovery permitted, as needed, to obtain more complete information necessary for the remaining phases of the litigation.[18] We feel certain that the trial court will consider all proper requests for modifications to the scheduling order, without losing sight of the objective to timely resolve as many asbestos claims as reasonably possible while at the same time ensuring that appropriate measures are undertaken during both the pre-trial and the trial stages of this litigation to extend basic guarantees of fairness to all the parties.

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[17] For example, the scheduling order in effect required that the plaintiffs "certify" certain detailed information relative to their claim and injury or risk the dismissal with prejudice of their claims. That date for certification has passed and, to this Court's knowledge, no claims have been dismissed pursuant to that order. Just as modifications to the certification requirements may need to be imposed, the trial court may also need to modify its temporal restrictions pertaining to the discovery deadline imposed on the defendants regarding product identification and the correlative sanction of precluding the admission of certain evidence.

[18] In this Court's opinion, it would be prudent to consider, upon proper request from the parties, a restructuring of the discovery process as a whole to more accurately match the need for obtaining information to the particular phase of the litigation. By better tailoring the discovery process to the respective phases of the litigation, it may be possible to somewhat curtail the resulting time and financial burdens imposed on the parties by requiring the completion of all-phases discovery before the common issues phase of the litigation has commenced. In this same vein, we observe that sanctions relative to discovery, if any, might best be addressed at the appropriate point in the trial process to which the discovery relates and should not be prematurely considered prior to the time at which such information is required.

It is this Court's perception that the trial court has listened carefully to requests raised from both the plaintiffs and the defendants below concerning the need to consider various amendments to the February 26, 2002, scheduling order. We are confident that the trial court will continue to accommodate the genuine concerns raised by the litigants[19] and give proper consideration to matters involving exigent circumstances, as they arise. We strongly caution the parties to limit their requests for scheduling modifications to matters involving legitimate need, being careful not to inundate the trial court with motions motivated more by posturing concerns than by proper legal grounds.

We note that the cases referred to the supervising judge include all those filed in the state based on exposure to asbestos. In numbered paragraph twelve of *Allman,* we provided for the inclusion of "asbestos cases filed subsequent" to that decision to be considered for transfer to the Mass Litigation Panel for disposition along with those cases already included in the group. 209 W.Va. at 734, 551 S.E.2d at 377. By referencing subsequently-filed asbestos cases, this Court was expressing its concern that the trial court should retain the ability to address both those asbestos cases already filed and included in the mass litigation grouping, as well as those cases yet to be filed that could properly be transferred for inclusion into the group. In addition, we observe that the trial court must maintain the necessary flexibility to address issues that arise during the pre-trial process, especially those issues deserving immediate attention such as those cases which, due to the severity of a particular plaintiff's injuries or

[19] As another means of ensuring that the rights of the parties receive the protection they deserve, we urge the trial court to place all discussions regarding substantive alterations to the trial scheduling order on the record.

medical condition, suggest expedited consideration for trial purposes.

Upon a full review of the petition and arguments, we do not find that Mobil has satisfied the requirements for issuance of a writ of prohibition. *See Berger*, 199 W.Va. at 14-15, 483 S.E.2d at 14-15, syl. pt. 4. Even if we chose to treat this petition solely as a petition for judicial review under TCR 26.01, similar to the *Allman* petition, we do not find the issues sufficiently ripe for review. The trial court deserves to be accorded the necessary flexibility to consider and address the issues raised by the parties and, perhaps even more critically, the opportunity to reevaluate the trial plan during its operation and to make necessary modifications when it determines that alterations are warranted. Lending further emphasis to the precipitous nature of this petition is the fact that the trial court simply has not had sufficient opportunity to identify with any finality the issues that are to be tried in common with regard to the liability phase or even to consider how the discovery process might be further tailored to address the issues to be tried at the various phases of the litigation, rather than to require all discovery to be completed by a date that precedes the initial liability trials.

While we chose to review the petition filed in *Allman* and the instant pleading filed by Mobil, we fully intend to allow the supervising judge to continue to fashion and implement various trial management plans without further intrusion by this Court. It is our clear preference not to address these cases again until final orders are in place and grounds for appeal are ripe. We recognize, however, that this Court may choose to exercise its constitutional grant of powers if, and when, issues of constitutional or overarching significance arise that demand immediate relief.

Having determined that Mobil has not demonstrated grounds sufficient to meet the standard for issuing a writ of prohibition, we hereby deny the requested relief; having no basis for issuing the requested extraordinary relief, we similarly are without grounds to issue a stay of the proceedings below. Given this Court's continuing concern that these cases proceed expeditiously, with due regard for all parties' rights, we hereby direct the entry of the necessary order and the issuance of the mandate pertaining to this petition forthwith.

Writ denied.

Maynard, Justice, concurring:

Frankly, this case leaves me with a profound disquiet. Mobil argues very persuasively and convincingly that the defendants have been denied due process in our courts. In fact, after a careful reading of the brief prepared by Steve Farmer, I am compelled to state that I am deeply concerned that Mobil is probably correct and some federal court will eventually tell us so. However, at this juncture at least, Mobil's claims of due process violations are premature because the trial court has not completed its trial plan. For that reason, I concur in the majority decision to deny extraordinary relief and write separately.

Initially, I must state that the observations and cautionary concerns set forth in the majority are troubling when viewed in light of opinions handed down by the United States Supreme Court. For example, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2250, 138 L.Ed.2d 689, 714 (1997), the Court upheld a court of appeals' decision to decertify an asbestos class which was intended to achieve a global settlement of current and future asbestos-related claims nationwide, stating that "individual

stakes are high and disparities among class members great." Two years later, the Court rejected another proposed global class of asbestos cases for essentially the same reasons. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

Mobil asserts, by referencing opinions such as these, that we may live to regret this decision for several reasons:

- the consolidation of thousands of dissimilar and unrelated asbestos claimants into a single trial violates procedural rules and the constitutional right to due process and equal protection;

- consolidation of asbestos cases violates Rule 42 of the West Virginia Rules of Civil Procedure, as well as the United States and West Virginia Constitutions;

- the use of a matrix to assess damages is a blatant and indefensible violation of Mobil's due process rights;

- the method for calculating punitive damages under the mass trial format advocated by the plaintiffs is unconstitutional;

- plaintiffs' mass trial plan offers no increased efficiency over single plaintiff trials; and

- a mass trial format will violate Mobil's right to a jury trial under state law and its due process rights.

As Mr. Farmer points out in his brief, this litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different states of

development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

The predominance of individual and irreconcilable differences from plaintiff to plaintiff in this litigation is illustrated by the potential problems with choice of law issues. Moreover, as many as five thousand of the plaintiffs included in the June 24, 2002 mass trial are not West Virginia residents and were never exposed to asbestos in this State. Rather, they have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation. This improper pilgrimage must be abated before one can even consider consolidation of cases to be a viable option.

West Virginia recognizes the doctrine of *lex loci delicti*, "that is, the substantive rights between the parties are determined by the law of the place of injury." *Vest v. St. Albans Psychiatric Hosp.*, 182 W.Va. 228, 229, 387 S.E.2d 282, 283 (1989); *McKinney v. Fairchild International, Inc.*, 199 W.Va. 718, 729, 487 S.E.2d 913, 924 (1997). Accordingly, the laws of many jurisdictions (including Pennsylvania, Ohio, Maryland, Kentucky, and Virginia, to name a few) will have to be considered and applied by a trial court during any mass trial in this litigation. The United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which a state has little or no interest. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 105 S.Ct. 2965, 2979, 86 L.Ed. 628, 648 (1985).

All the due process arguments are compelling, but this is the due process claim about which I am most fearful of even-

tual reversal. Because so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the *Phillips* case, I just don't see how the trial court can tread safely through this judicial minefield.

Further, these cases will require presentation of evidence concerning a myriad of highly individual facts, such as:

- the precise product(s) to which the plaintiff was exposed;
- the manner, conditions, and circumstances of each exposure;
- the dates, duration, and location of each exposure;
- the manner in which each alleged asbestos containing product was used;
- whether there was protective equipment available and actually used;
- the presence or absence of warnings included with the specific product(s) at issue; and
- each plaintiff's medical, family, and personal history, including such issues as whether and how much the plaintiff has used tobacco products, whether the plaintiff has experienced other occupational exposures to different substances (e.g., benzene, carbon tetrachloride, and coal dust) and the plaintiff's family health history.

The necessity of delving into such issues has been widely recognized by the courts. Given these individual issues, a mass trial—indeed, even small-group trials—would create a "Frankenstein's Monster" of the type postulated by the late

Professor Charles Alan Wright. *Castano v. American Tobacco Co.*, 84 F.3d, 734, 745 n.19 (5th Cir. 1996).

The suggestion in note 8 on page 27 of Mr. Farmer's brief is probably what we ought to do. He recommends: "If this Court wants to achieve a drastic and immediate reduction of the number of asbestos personal injury cases crowding the state's dockets, simply apply *lex loci delicti* and send the thousands of cases improperly filed here back to their correct jurisdictions." Also, due to the fact that the directives provided to the trial court in *State ex rel. Allman v. MacQueen*, 209 W.Va. 726, 551 S.E.2d 369 (2001), have not been fully implemented, I do not think we should have expressed "observations and cautionary concerns for the trial court's consideration and use." Instead, I would simply direct the trial court to proceed to resolve this "elephantine" mass of litigation in as efficient and effective manner as possible in accordance with the *Allman* directives. Then, if the concerns noted by the majority arise, they can be dealt with upon appeals taken from final orders.

I believe the majority opinion correctly denied extraordinary relief at this juncture in the litigation. However, in light of well-settled federal law, I fear that allowing every plaintiff who wishes to litigate a claim in West Virginia, even though he or she has no connection to this State, may violate the defendants' due process rights.

Notwithstanding the foregoing, there is another side to this issue which is equally thorny and troubling. If this mass litigation is simply halted, clearly all the plaintiffs would be denied their due process rights and their day in court. There should be a simple answer that would guarantee everyone's due process rights, but I cannot conceive or fashion one.

Accordingly, I concur in the final result.

Appendix B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION CIVIL ACTION NO. 01-C-9000

TRIAL SCHEDULING ORDER

Pursuant to Rule 26.01 of the West Virginia Trial Court Rules and the West Virginia Rules of Civil Procedure, the following schedule is hereby ORDERED by the court in the above-styled civil action.

I. OVERVIEW

Several thousand asbestos personal injury claims are currently pending before this court. All of these cases have been pooled and referred to the Mass Litigation Panel for the development of a case management plan or plans. Historically, in West Virginia and other states which experienced large numbers of asbestos-related personal injury suits, the trial of individual cases or of small groups of cases has resulted in time-consuming and expensive relitigation of common issues. These problems have, in turn, prevented courts from disposing of their asbestos cases with the same dispatch as their routine litigation and have caused inordinately high transaction costs which occasionally exceed the amounts recovered by injured plaintiffs.

In this state, over the past twenty years, the courts have developed a specialized approach to the asbestos personal injury litigation which has resulted in the prompt resolution of the cases in compliance with the requirements of Article 3, Section 17 of the West Virginia Constitution, and has reduced litigation costs to a fraction of what they would have

been if the cases had been tried on a piecemeal basis. That approach has been to sever, for a single initial trial, the liability issues which are common to all pending cases. While counsel have referred to this process as a "consolidation," it is not and has not been a consolidation as contemplated by Rule 42 of the West Virginia Rules of Civil Procedure and the decisional law relating to that Rule.

Virtually all of the arguments advanced in opposition to this court's announced intention to continue to use the trial methodology which has proven so effective at disposing of tens of thousands of asbestos-related claims so quickly and inexpensively are directed toward a consolidation of large numbers of cases for trial on all issues—a method that the court has never contemplated. The West Virginia Supreme Court of Appeals has expressly approved a trial plan which is substantially identical to that which follows. *See State ex rel. Appalachian Power Co. v. MacQueen,* 479 S.E.2d 300 (W. Va. 1996).

II. TRIAL DATE: SEPTEMBER 23, 2002

A. The trial format will be substantially identical to the previous consolidated "mass trials" which have been referred to as "Kanawha Mass 1, Kanawha Mass II, and Mon Mass II." The object of any trials will be to obtain verdicts on the issues related solely to the fault of the defendants in three general types of causes of action asserted by the plaintiffs. Those causes of action are (1) product liability claims; (2) premises liability claims; and (3) claims by employees against their employers under the provisions of W. Va. Code § 23-4-2. Three trial groups shall proceed simultaneously before three juries in a manner which will (1) minimize the recitation of common evidence; and (2) allow counsel in each group to focus on defendant-specific evidence and avoid con-

fusion of the jury. Further, in each trial group, except Group III, the jury will be asked to evaluate the conduct of each individual defendant to determine whether that conduct warrants awarding punitive damages and, if so, what ratio or proportion a punitive damages award should bear to any subsequent award of compensatory damages. All asbestos-related cases pending between the parties as of September 6, 2001, are subject to this Order.

1. Group I will consist of one trial to determine the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of a conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor of asbestos-containing products. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant manufacturers sold or distributed a defective asbestos-containing product or whether and for what time period any other defendant engaged in a conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor of asbestos-containing products.

2. Group II will consist of one trial to determine the common issues of fault of all premises liability defendants. Premises liability defendants are those defendants against which a cause of action is asserted for failure to maintain a safe workplace. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant had actual or constructive knowledge that asbestos-containing materials used in the workplace posed a risk of harm to workers exposed to the materials.

3. Group III will consist of one trial to determine the common issues of fault of the employer defendants for ac-

tions by employees under W. Va. Code § 23-4-2. Specifically, interrogatories will be submitted to the jury for findings concerning whether and for what time period any defendant (1) prior to May 9, 1983, was guilty of misconduct of a willful, wanton, and reckless character and had knowledge and appreciation of the high degree of risk of physical harm to employees resulting from exposure to asbestos-containing products in the workplace; or (2) subsequent to May 9, 1983, had a subjective realization and appreciation that the use of asbestos-containing products without warnings or appropriate safety measures in the workplace created an unsafe working condition and a high degree of risk and a strong probability of serious injury or death presented by the unsafe working condition.

4. The presiding Judge and two other Judges to be designated from the Mass Litigation Panel shall begin the trials described in subparagraphs 1-3 above by selecting three juries. The trials shall proceed simultaneously and, as necessary to avoid the presentation of repetitive evidence, the Judges may convene all juries together to hear common witnesses and receive common evidence.

5. The court recognizes that the parties are engaged in active settlement discussions, and that historically, large numbers of claims have been resolved in advance of the scheduled trials. If, in the judgment of the presiding Judge, sufficient numbers of defendants have reached complete settlements of all pending claims prior to trial, the trials on all the issues identified in subparagraphs 1-3 above may be held before a single jury.

6. Any verdicts returned in the three trial groups ("Groups I-III") shall be deemed to constitute a verdict on the relevant issues in all asbestos personal injury litigation which

has been referred to the Mass Litigation Panel by the Supreme Court of Appeals pursuant to Trial Court Rule 26.01.

7. Once verdicts are returned on the issues related solely to the fault of the defendants as described above, the jurors picked in Groups I-III will be dismissed. New juries will be impaneled for mini-trials which will be conducted to determine causation and damages. These mini-trials will begin four weeks after verdicts are rendered in Groups I-III. The mini-trials will consist of a number of plaintiffs against their common defendants. The preferred manner of addressing the causation and damages issues will be to break the parties down into manageable groups based on causes of action, geographic locations, and similar exposure criteria. At the beginning of each mini-trial, the Judge will read the verdict forms from the previous trials, including all special interrogatories and jury findings on each interrogatory, to the new jurors. The Judge will also advise the new jurors that they are bound by the decisions of the other juries and that they will only consider individual causation and damages.

8. Within two weeks after verdicts are reached in Groups I-III, a scheduling conference will be held for the causation and damages mini-trials.

B. The court never considered and hereby rejects a proposal for use of a matrix developed by utilizing depositions and findings of a master as the basis for the sample. The court will consider, however, the appropriateness of the use of a matrix constructed from actual jury verdicts, depending upon the type and number of cases remaining after verdicts are rendered in Groups I-III. At the current time, a workable plan for utilizing a matrix is not before the court, and there is no need to take evidence on the use of a matrix until at least the scheduling conference for the causation and

damages mini-trials. By that time, the court anticipates that it will be able to ascertain the necessity of implementing such a matrix based on the type of cases and the number of plaintiffs and defendants remaining in the action.

C. The matrix alternative will be used only if necessary to maintain the mandate of utilizing a jury system as required by Article 3, Section 13 of the West Virginia Constitution while also adhering to Article 3, Section 17 which requires that justice be administered without denial or delay. If it is determined by a jury or juries that the defendants have damaged many plaintiffs, and if the court determines that, by virtually all of the same activities, the defendants have injured plaintiffs so numerous that the plaintiffs will be denied their right to justice without excessive delay, then the court may be compelled to adopt a matrix based on actual jury verdicts to provide the parties their guaranteed access to justice.

III. MOTIONS:

A. All parties must file any pre-trial motions under Rule 12 of the West Virginia Rules of Civil Procedure, including any dispositive motions, by SEPTEMBER 5, 2002. Any responses to dispositive motions must be filed no later than SEPTEMBER 10, 2002.

B. All motions attacking the venue or jurisdiction of the court MUST be filed by MARCH 25, 2002 or they will be waived. Parties opposing such motion(s) must file their written responses no later than APRIL 8, 2002. No such motions shall be fled if already ruled upon in this action. Hearing on said motions will be held on APRIL 11, 2002.

C. Motions for summary judgment may be filed by AUGUST 29, 2002, if discovery on the individual case warrants it.

D. All motions in this case shall be filed with the Kanawha County Circuit Clerk's Office in Case No. 02-C-9004, with a courtesy copy sent to the Honorable Martin J. Gaughan, Brooke County Courthouse, P.0. Box 474, Wellsburg, West Virginia 26070.

IV. DISCOVERY:

E. PLAINTIFFS' CERTIFICATION:

1. By MARCH 8, 2002, plaintiffs' counsel must certify to the court the identity of all plaintiffs remaining in the case by providing the following information for each remaining plaintiff: (1) name of plaintiff or plaintiff's decedent; (2) name of spouse; (3) plaintiff's address; (4) plaintiffs date of birth; (5) plaintiff's decedent's date of death, if applicable; (6) plaintiff's social security number; (7) asbestos-related disease diagnosis alleged; (B) date of diagnosis; (9) plaintiff's occupation or trade; (10) name and address of premises where plaintiff worked; (11) place where plaintiff was residing when the alleged exposure to asbestos occurred; (12) name of plaintiff's employer at each premises; (13) trade and dates of employment at each site; (14) dates and places of alleged exposure to asbestos for each defendant; (15) identification of asbestos-containing products/manufacturers to which each plaintiff was allegedly exposed at each premises (identify by product, premises, and dates of alleged exposure); (15) identification of those defendants against which each remaining plaintiff asserts a claim in this lawsuit; and (17) theory of liability for each remaining defendant.

2. Any plaintiffs not certified as described above will be dismissed from the case with prejudice.

3. Within ten (10) days after verdicts are rendered in Groups I-III, plaintiffs' counsel must again certify to the

court (1) which plaintiffs remain in this case; and (2) who the remaining defendants are for each plaintiff.

F. DEFENDANTS' ACKNOWLEDGMENT:

1. All defendants must acknowledge which certified plaintiffs have actions pending against them by APRIL 2, 2002. The defendants must provide each such plaintiff any of the following information that they have under their control which is applicable to the pending cases: (1) whether they manufactured, supplied, used, or allowed to be used asbestos-containing products during the time and at the places designated by the plaintiffs; (2) the dates of an employee's hiring; (3) the dates of various job assignments held by the employee (this requirement refers to general job assignments, i.e., crane operator in the strip steel, and not daily or weekly moves within the work site); and (4) the time period when any non-employee plaintiff's employers or outside companies had a contract to provide services within the premises, as well as a general description of the contract or project, i.e., install lining of boiler #2. This last requirement is not meant to instruct the defendants to provide an indication of each day an individual may have been on the premises.

2. All defendants who do not disclose said information, or a reasonable explanation as to why they cannot provide said information, will be deemed to have admitted the accuracy of the plaintiffs disclosure and will not be permitted to offer evidence to rebut such disclosure.

G. Discovery on all issues may begin on MARCH 12, 2002. Said discovery shall be conducted in accordance with the First Master Case Management Order filed on May 24, 2001, so long as it does not contravene the specific requirements of this Order.

H. EVIDENTIARY DEPOSITIONS:

1. Defendants may begin to take depositions of the plaintiffs on MARCH 27, 2002.

2. Depositions of the defendants' experts may begin on MAY 16, 2002.

3. All depositions must be completed by AUGUST 5, 2002.

4. All parties shall designate in writing any depositions they intend to use at trial, including page(s) and line number(s) by AUGUST 9, 2002.

I. WITNESS DISCLOSURE:

1. Plaintiffs must disclose all product and premises identification, and witnesses they intend to call at trial by APRIL 16, 2002, along with the following information: (1) what product(s) they will be identifying; (2) on which premises the products were located; and (3) their addresses and phone numbers. If this information is not provided by the deadline, such witnesses will not be permitted to testify at trial.

2. Plaintiffs must provide a list of their expert witnesses who will be testifying at trial, along with detailed reports or reference to previous reports or depositions, on or before APRIL 16, 2002. Defendants must provide a list of their expert witnesses who will be testifying at trial, along with detailed reports or reference to previous reports or depositions, on or before MAY 16, 2002.

3. Plaintiffs must disclose all lay witnesses (excluding product and premises identification witnesses) not previously disclosed by MAY 16, 2,002. The defendants must disclose

all lay witnesses that they intend to call at trial by JUNE 17, 2002.

4. Plaintiffs must disclose any rebuttal experts by JUNE 5, 2002.

J. Plaintiffs must provide all tissue for mesotheliomas or other malignancies by APRIL 26, 2002. In the event additional material becomes available or is discovered thereafter, it shall be provided within seven days after first coming into possession of plaintiffs' counsel.

K. Within fifteen days after verdicts are rendered in Groups I-III, parties must identify all lay witnesses who are testifying in the causation and damages mini-trials, along with addresses and phone numbers of those witnesses.

L. MEDICAL EXAMINATIONS:

1. Defendants may begin scheduling Rule 35 medical examinations by MARCH 12, 2002.

2. If, by APRIL 12, 2002, plaintiffs provide defense counsel with general medical authorizations for the last ten (10) years and authorizations for all treatments or tests associated with a plaintiffs lungs and an affidavit covering a plaintiff's smoking history and/or use of tobacco products, the plaintiffs will not have to produce any medical records except those their treating physician and/or medical experts will rely upon at trial.

3. With regard to those plaintiffs who meet the medical and smoking disclosures deadline set forth above, associated defendants must complete all Rule 35 medical examinations by AUGUST 5, 2002. Those plaintiffs who do not meet the disclosure deadlines must complete all Rule 35 medical examinations by the end of discovery.

4. Plaintiffs will be required to submit to one (1) and only one (1) Rule 35 examination unless the court rules otherwise.

5. The defendants shall promptly pay all reasonable expenses incurred by any plaintiff in attending a medical examination, including travel expenses.

M. The last day to file interrogatories, requests for production, and requests for admission is JULY 1, 2002.

N. The parties must provide exhibit lists by JULY 15, 2002. Any objections to the exhibit lists must be filed by AUGUST 5, 2002. Any replies to the other's objections to exhibits must be filed by AUGUST 26, 2002.

O. The plaintiffs must produce their final witness list for use at trial by JULY 15, 2002. Defendants must produce their final witness list for use at trial by JULY 22, 2002.

P. Defendants may provide a letter to any plaintiff requesting dismissal for lack of product or premises identification by AUGUST 9, 2002. Plaintiffs must respond in writing to any defendant's "no evidence" letter by AUGUST 29, 2002. Failure to respond may result in a dismissal with prejudice of the defendant submitting the letter.

Q. DOCUMENTS:

1. All documents to be used at trial which have already been admitted in a previous asbestos mass litigation must be designated by the appropriate identifications previously assigned to it by MAY 10, 2002.

2. On or before APRIL 24, 2002, all documents already filed in a previous mass litigation but not admitted into evidence must be designated by the appropriate designation with an indication of any previous ruling on its admissibility.

3. Any documents that have not been previously offered in any asbestos mass litigation trial must be disclosed by AUGUST 16, 2002. This does not refer to documents relating to individual medical treatment.

4. Any settlement or document conferences may be scheduled starting on SEPTEMBER 5, 2002.

R. DISCOVERY COMPLETION DATE: SEPTEMBER 5, 2002

All expert discovery and trial depositions to be used in Groups I-III must be completed by the end of discovery. At this time, the defendants will collectively submit a detailed schedule to the court and to plaintiffs' counsel establishing times for specific defendant-related documents and for settlement conferences with specific defendants. So far as is practicable, document issues relating to certain defendants will be dealt with in the morning session of court and settlement conferences for the same defendants will be held in the afternoon session.

It is further ORDERED that the Clerk of the Circuit Court of Kanawha County, West Virginia, provide a copy of this Order to lead counsel for the parties from whom the court received pleadings in the original jurisdiction proceedings and to all counsel of record in Civil Action No. 01-C-9000.

It is further ORDERED that the Clerk of the Circuit Court of Kanawha County, West Virginia file this Order in both the general administrative file, Case No. 01-C-9000, as well as in the specific file for the September trial, Case No. 02-C-9004.

Appendix C

WEST VIRGINIA TRIAL COURT RULE 26.01: MASS LITIGATION PANEL AND PROCEDURE

(a) The Mass Litigation Panel shall consist of six (6) active or senior status circuit judges who shall be appointed by the Chief Justice, with the Approval of the full Court. Each shall serve on the Panel for a term of three (3) years, two (2) to be appointed each year. There shall be no prohibition against serving successive terms. The Chief Justice shall annually designate one of the members of the Panel to serve as its chairman to preside over the activities of the Panel and to report to the Supreme Court of Appeals.

(b) The Mass Litigation Panel shall have the following responsibilities:

1. To develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice;

2. To preside over actions referred to it by the Chief Justice and to provide assistance and guidance to any other circuit judge within the State upon assignment by the Chief Justice;

3. To make recommendations to the Chief Justice on the transfer of actions from one circuit to another in order to facilitate any case management or trial methodologies developed by the Panel, and to request the assignment of additional circuit judges to assist in any activities that may be

necessary to resolve actions or issues in actions that may be referred to the Panel;

4. To recommend rules for adoption by the Supreme Court of Appeals for the conduct of the business of the panel;

5. To report periodically to the Chief Justice concerning its activities; and

6. To take such action as is reasonably necessary and incidental to the powers and responsibilities expressly conferred by this rule or by the specific directive of the Chief Justice.

(c) "Mass litigation" shall be defined as two (2) or more civil actions ending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect with-

out actual product failure or injury.

(d) Any coordinated or consolidated actions transferred pursuant to this rule shall be conducted by a member or members of the Panel and/or by a judge to whom the actions are assigned by the Chief Justice. Any member of the Panel or any circuit judge to whom actions are assigned under this rule shall be authorized to exercise the powers of a circuit judge in any circuit in which actions are pending or have been transferred for the purpose of conducting any proceedings consistent with the Panel's case management and trial methodologies.

(e) Any party, judge, or the Administrative Director of the Courts may seek a referral to the Panel for transfer of actions by filing a Motion to Refer to Mass Litigation Panel in any circuit court in which a qualified case is ending. The motion shall identify the nature of the actions sought to be referred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular cases in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future.

Said motion may be filed within six (6) months after the filing date of the case in which the motion is being filed; provided, however, that a judge or the Administrative Director may file said motion at any time, if it is determined that litigation qualifies as mass litigation and that the litigation may be resolved more expeditiously by reference to the Panel.

The motion shall be served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director. Any party shall have twenty (20) days after the motion is filed to file a reply memorandum stating its po-

sition and opposition, if any. Any affected judge may file a reply memorandum within ten (10) days thereafter.

After the response periods have expired, the judge of the court in which the motion was filed shall forward to the Chief Justice a copy of the motion and reply memoranda filed in the case. Upon review of the motion and reply memoranda, the Chief Justice may act directly upon the motion or may direct the Panel to conduct a hearing and make recommendations concerning coordinated or consolidated proceedings under this rule. The Chief Justice shall act upon the motion within ten (10) days.

If the motion is referred to the Panel, the Panel or a designated member of the Panel shall hold a hearing to receive evidence and entertain arguments by the parties or any judge, and shall submit findings of fact and a recommendation to the Chief Justice. Said recommendation shall be provided to he Chief Justice within twenty (20) days from the date the matter was referred to the Panel.

The Chief Justice, whether acting directly upon the motion or upon the recommendation of the Panel, shall enter an order either granting or denying the motion, or by providing modified relief consistent with this rule within ten (10) days.

(f) The filing of a motion under subsection (e) of this rule shall not operate to stay discovery in any affected case in any instance or to delay a scheduled trial unless a stay of a trial is ordered by the Chief Justice.

(g) Nothing contained in this rule shall be deemed to affect the authority of a circuit judge to act independently under the provisions of W.Va. R.Civ.P. 42.

Supreme Court, U.S.
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(2)

No. 02-132

IN THE

Supreme Court of the United States

MOBIL CORPORATION and
HONEYWELL INTERNATIONAL INC.,

Petitioners,

v.

BRUCE W. ADKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONERS

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44

QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged have no connection at all to the state.

CORPORATE DISCLOSURE STATEMENT

Respondent Union Carbide Corporation is wholly owned by The Dow Chemical Company ("TDCC"). TDCC has no parent companies, and no other publicly held company owns 10 percent or more of TDCC's stock.

Respondent Amchem Products, Inc. is no longer a separate corporate entity. Amchem Products, Inc.'s corporate successor is Aventis Crop Science USA Inc., which is wholly-owned by Bayer AG. Bayer AG has no parent companies, and no other publicly held company owns 10 percent or more of Bayer AG's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. The "Mass Trial" Procedure	2
B. Union Carbide and Asbestos	4
C. Ramification of the "Mass Trial" Procedure for Union Carbide	6
Reasons for Granting the Writ	8
I. The West Virginia Court's Holding That Mass Aggregation For Trial Requires No Inquiry Into Commonality Or Potential Prejudice Violates Due Process	10
A. Current Mechanisms for Aggregation Adopt the Existence of Common Issues and the Avoidance of Prejudice as Due Process Touchstones	11
B. The Aggregation of Claims Historically Required the Existence of Common Issues and the Avoidance of Prejudice	15

Contents

		Page
II.	The West Virginia Court's Choice-Of-Law Holding Conflicts With Decisions Of This Court And Violates Due Process	19
	A. The Application of West Virginia Law to All Claims Violates Principles of Federalism and Due Process	19
	B. A Conflict of Laws Does Exist Leading To a Violation of the Constitutional Limitations on Choice of Law and Horizontal Federalism	22
	C. The Application of Multiple States' Laws in the Mass Trial Creates Jury Confusion and Violates Due Process ..	27
Conclusion		30

TABLE OF CITED AUTHORITIES

Page

Cases:

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) ... 22

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 13, 14, 17

Andrews v. Spear, 4 Dill. 470 (D. Minn. 1871) 18

Arrington v. City of Fairfield, 414 F.2d 687 (5th Cir. 1969) 13

Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970) 12-13

Becker v. Baron Bros. Coliseum Auto Parts, 649 A.2d 613 (N.J. 1994) 5

Blanton v. Cooper Indus., Inc., 99 F. Supp. 2d 797 (E.D. Ky. 2000) 24

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 21

Boddie v. Connecticut, 401 U.S. 371 (1971) 10

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 21

Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527 (6th Cir. 1999) 24

California v. Ramos, 463 U.S. 992 (1983) 8

Cited Authorities

	Page
Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994)	27
Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996)	28
Celotex Corporation v. Copeland, 471 So. 2d 533 (Fla. 1985)	5
Comman v. Insurance Co., 1 Caines, 114, Cole & C. Cas. 188 (N.Y. 1803)	17
Dangler v. Town of Whitestown, 672 N.Y.S.2d 188 (4th Dep't 1998)	27
Eisen v. Carlisle 417 U.S. 156 (1974)	17
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)	21
Fleishman v. Prudential-Bache Securities, Inc., 103 F.R.D. 623 (E.D. Wisc. 1984)	12
Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25 (Ky. 1955)	24
Garber v. Randell, 477 F.2d 711 (2d Cir. 1973)	11
General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982)	14
Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996)	28

Cited Authorities

	Page
Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985)	5
Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954)	7-8
Hansberry v. Lee, 311 U.S. 32 (1940)	16, 17
Harper v Virginia Dept. of Taxation, 509 U.S. 86 (1993)	8
Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)	9, 18-19
In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996)	12
In re Asbestos & Asbestos Insulation Material Prods. Liability Litig., 431 F. Supp. 906 (J.P.M.L. 1977)	7, 13
In re Bridgestone/Firestone, Tires Prods. Liab. Litig. Appeals, 288 F.3d 1012 (7th Cir. 2002)	28, 29
In re Consol. Parlodel Litig., 182 F.R.D. 441 (D. N.J. 1998)	11, 28
In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990)	7
In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417 (E.D. La. 1997)	28
In re Northern Dist, of Cal. Dalkon Shield Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982)	12

Cited Authorities

Page

Johnson v. BP Chemicals, Inc., 707 N.E.2d 1107 (Ohio 1999) 25

Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990) 11

Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933) 18

Keep v. R.R., 3 McCrary, 302, 10 F. 454 (D. Mo. 1882) 18

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) 21

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) 29

Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) 8, 11

Mandolidis v Elkins Industries, Inc., 161 W. Va. 695 (W. Va. 1978) 23

Marlin v. Bill Rich Construction, Inc., 482 S.E.2d 620 (W. Va. 1996) 26

McKinney v. Fairchild International, Inc., 487 S.E.2d 913 (W. Va. 1997) 28

Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285 (1892) 17, 18

Cited Authorities

Page

New York Life Ins. Co. v. Head, 234 U.S. 149 (1914) 21

Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986) 27

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*

Ricottilli v. Summersville Memorial Hospital, 425 S.E.2d 629 (W. Va. 1992) 26

Schad v. Arizona, 501 U.S. 624 (1991) 9

Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996) .. 26

Smith v. Swormstedt, 57 U.S. 288 (1850) 16

State ex rel. Mobil Corp. v. Gaughan, 563 S.E.2d 419 (W. Va. 2002) 1, 7, 10

Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) 16

Thompson v. Shepherd, 9 Johns. 262 (N.Y. 1812) .. 17

Truax v. Corrigan, 257 U.S. 312 (1921) 10

United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966) 12

Vest v. St. Albans Hospital, 387 S.E.2d 282 (W. Va. 1989) 27

Page

Webb v. Goord, 197 F.R.D. 98 (S.D.N.Y. 2000) ... 12

Wiede v. Ins. Cos., 3 Chi. Leg. N. 353 (D. Minn. 1871) 18

Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) 29

Witherlee v. Ins. Co., 24 Pick. 67 (N.Y. 1830) 18

Wolff v. A-One Oil, Inc., 627 N.Y.S.2d 788 (2d Dep't 1995) 27

United States Constitution:

Fifth Amendment 8, 29

Fourteenth Amendment ..... i, 8, 29

State Constitutions:

Ohio Constitution Art. 2 § 34 25

West Virginia Constitution Art. 3 § 17 10

Statutes:

Ky. Rev. Stat. § 342.610 24

Ky. Rev. Stat. § 342.690 24

Ohio Rev. Code § 2745.01 25

Cited Authorities

	Page
28 U.S.C. § 1407	13
W. Va. Code § 23-4-2	3, 23, 24
Rules:	
Fed. R. Civ. P. 20	12
Fed. R. Civ. P. 23	13, 14
Fed. R. Civ. P. 42	8, 11
Supreme Court Rule 12(6)	1
W. Va. Trial Court Rule 26.01	2, 8
Other Authorities:	
John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 Seton Hall L. Rev. 698 (2001)	20
Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L. Rev. 213 (1990)	17
Marc A. Claybon, *Ohio's "Employment Intentional Tort": A Workers' Compensation Exception, or the Creation of an Entirely New Cause of Action?*, 44 Clev. St. L. Rev. 381 (1996)	25

Cited Authorities

Page

Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179 (2001) 11

E. Ilgren and E. Chatfield, *Coalinga-Fibre – A Short, Amphibole-Free Chrysotile: Part 1: Evidence For A Lack Of Fibrogenic Activity*, Indoor Built Environ., 6:264-276 (1997) 4

E. Ilgren and E. Chatfield, *Coalinga Fibre – A Short, Amphibole-Free Chrysotile: Part 2: Evidence For A Lack Of Tumourigenic Activity*, Indoor Built Environ., 7:18-31 (1997) 4-5

E. Ilgren and E. Chatfield, *Coalinga Fibre – A Short, Amphibole-Free Chrysotile: Part 3: Lack of Biopersistence*, Indoor Built Environ., 7:98-109 (1998) 5

Justice Robert H. Jackson, *Full Faith and Credit – The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945) 19, 20

Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992) 19, 20

Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) 20, 21

Cited Authorities

Page

Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 Def. Couns. J., 18 (1996) 14

Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L .Rev. 69 (1986) 15

Vanderbilt Law Review, *Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573 (1983) 5

C. Wright & A. Miller, *Federal Practice & Procedure: Civil* (West 2d ed. 1995) 12

Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 U.C.L.A. L. Rev. 514 (1980) 15, 16

Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, (Yale University Press 1987) 16

Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687 (1997) 15

STATEMENT OF THE CASE

Union Carbide Corporation ("Union Carbide") and Amchem Products Inc. ("Amchem"), parties to the decision below in *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002) in the Supreme Court of Appeals of West Virginia, file this Brief in Support of the Petitioners' petition for a writ of certiorari pursuant to Supreme Court Rule 12(6). *See* App. F at 157a and 160a.

The Supreme Court of Appeals of West Virginia in *Gaughan* denied the Defendants' writ of prohibition/mandamus arising out of the Trial Scheduling Order ("TSO") dated February 26, 2002 that created a "Mass Trial"[1] for the resolution of approximately 8000 asbestos personal injury claims. *See* App. A at 3a.

A petition for a writ of certiorari was docketed by this Court on July 29, 2002. The Petitioners present two questions for this Court to consider. In relation to the first question the Petitioners argue that the consideration of the existence of common issues and a lack of prejudice is a requirement of due process that must be satisfied before an aggregation of claims can be permitted. The focus of Petitioners' arguments is the case law surrounding the prerequisites for consolidation. The second question implicates this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and the Petitioners argue that West Virginia cannot apply its law to the current aggregation of cases because many of those cases have an insufficient connection to the forum, leading to the violation of the defendants' due process rights and principals of federalism.

Union Carbide and Amchem file this Brief in Support for the purpose of joining in the arguments made by Petitioners in the petition for a writ of certiorari and for the additional purpose of arguing:

1. that all forms of aggregation of claims, regardless of whether such aggregation is referred to as a "consolidation" or

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1. The "Mass Trial" case was styled *In Re: Asbestos Litigation*, Civil Action No. 01-C-9000, Kanawha County.

by some other name, require a threshold inquiry into commonality and lack of prejudice to satisfy due process; and

2. in the "Mass Trial" context no choice of law analysis can pass muster under constitutional principals of due process because even if the Court applied the law of the numerous states that had significant contacts to the underlying causes of action, the trial would be unmanageable and confusing to the jury so as to violate the defendants' due process right to be given a meaningful opportunity to be heard.

The aggregation of asbestos-related cases into a mass trial in West Virginia simply cannot address the innumerable and diverse legal and factual issues raised by the approximately 8,000 plaintiffs' claims, and as a result, violates the due process rights of Union Carbide and Amchem[2].

A. The "Mass Trial" Procedure

The West Virginia Supreme Court enacted Trial Court Rule 26.01 ("Rule 26.01") in 1999. Rule 26.01 establishes a Mass Litigation Panel which is charged with the responsibility to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice." *See* App. C at 36a.

On February 26, 2002 Judge Gaughan, as a member of the Mass Litigation Panel, entered the TSO pursuant to Rule 26.01 which specified a trial date of September 23, 2002. The TSO sets out a procedure that requires the aggregation of all asbestos-related cases pending between the parties as of September 6, 2001. *See* App. B at 24a.

The procedure outlined in the TSO involves two stages:

Stage A — simultaneous mass trials to determine the fault or liability of defendants based upon whether the cause of action is a:

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2. Amchem is a party to this Brief in Support and joins in the arguments made by Union Carbide. The specific facts concerning Amchem will not be addressed in this brief due to the constraints of space.

1. product liability claim
2. premises liability claim[3]
3. claim by an employee against their employer under the provisions of W. Va. Code § 23-4-2[4].

Stage B – mini-trials to determine causation and damages. *See* App. B at 25a-29a. Order II.A and A.7.

The juries in stage A will "determine the common issues of fault." *See* App. B at 26a-27a. Order II.A.1, 2 and 3. The Trial Order does not specify what those common issues are. The juries hearing the product and premises liability claims will also determine if the defendants' conduct warrants the awarding of punitive damages. *See* App. B at 26a. Order II.A.

The TSO proposes to impanel new juries for stage B. The number of plaintiffs per mini-trial is not specified. How the plaintiffs will be grouped is explained as "manageable groups based on causes of action, geographic locations, and similar exposure criteria." *See* App. B at 28a. Order II.A.7. The number of mini-trials to be held is not specified but the Trial Order reserves for consideration a "matrix constructed from actual jury verdicts" as a means for extrapolating those jury verdicts to plaintiffs not subject to a mini-trial to ensure plaintiffs will not be denied their right to justice without excessive delay. *See* App. B at 28a-29a. Order II.B. and C.

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3. This cause of action refers to the liability of the owner of premises that had asbestos-containing materials in them and with which the plaintiffs had contact for some business purpose, such as abatement or the construction of facilities.

4. This cause of action refers to the intentional infliction of harm exception to a Workers' Compensation scheme. The exception exists because certain conduct by an employer towards an employee is beyond the scope of the employment relationship such that the parties cease to be employee and employer and become intentional tortfeasor and victim. At a hearing on August 12, 2002, the Mass Litigation Panel (Judges Recht, Stephens and Moats presiding) indicated that this part of the "Mass Trial" would be rescheduled to December 2, 2002.

B. Union Carbide and Asbestos

To allow the Court to see the actual effect of the "Mass Trial" this Brief illustrates its arguments through reference to some of Union Carbide's involvement with asbestos that is the subject of the TSO. Union Carbide mined and milled a unique short form of chrysotile asbestos, known as "Calidria" from about 1963 to 1985. Union Carbide also used non-Calidria asbestos products manufactured by companies other than Union Carbide in its chemical plants located in West Virginia, Kentucky and Ohio that were handled by Union Carbide's employees as well as by numerous contractors' employees.

Union Carbide's operations have led to claims against it in all three of the proposed mass trials in Phase A. The mining and milling activities have led to Union Carbide being named in product liability suits. The chemical plant operations have resulted in suits from contractors' employees based on a premises liability theory. The statutory "intentional infliction of harm" exception to Workers' Compensation schemes has resulted in suits by Union Carbide employees.

The diverse types of asbestos, uses of asbestos, medical effects and forms of exposure to asbestos at issue in the case are aggregated so as to collapse not only the differences that exist within Union Carbide's operations, but also the differences between Union Carbide and the hundreds of other defendants.

(a) Product Liability Claims

"Calidria" asbestos is short grade fiber that was produced in small volumes and used in a limited number of applications. Calidria has been used as a filler, reinforcing agent, opacifier, and thickening agent in such products as drywall patching compounds, plastics, and paints. At trial Union Carbide would argue that Calidria's unique physical characteristics and chemical composition means that it does not cause asbestos-related disease. See E. Ilgren and E. Chatfield, *Coalinga-Fibre — A Short, Amphibole-Free Chrysotile: Part 1: Evidence For A Lack Of Fibrogenic Activity*, Indoor Built Environ., 6:264-276 (1997), E. Ilgren and E. Chatfield, *Coalinga Fibre — A Short, Amphibole-Free Chrysotile: Part 2: Evidence For A Lack Of*

Tumourigenic Activity, Indoor Built Environ., 7:18-31 (1997); E. Ilgren and E. Chatfield, *Coalinga Fibre — A Short, Amphibole-Free Chrysotile: Part 3: Lack of Biopersistence*, Indoor Built Environ., 7:98-109 (1998).

The other defendants included in the "Mass Trial" are an assortment of companies that manufactured a range of dissimilar products such as gaskets, automotive friction products, mastic products, cement shingles and boards, pipe insulation, block insulation, adhesives, joint compounds, and insulation cements. *See generally Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 578 (1983) ("Today more than three thousand products commonly found in the home and work environments contain asbestos.").

Moreover, the products at issue contained entirely different types of asbestos fibers such as amosite, crocidolite, tremolite, tremolite contaminated chrysotile or chrysotile asbestos, which have significantly different physical characteristics and thus pose significantly different risks in the development of human disease. *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985), ("[A]ll asbestos-containing products cannot be lumped together."); *accord Celotex Corporation v. Copeland*, 471 So.2d 533, 538 (Fla. 1985) and *Becker v. Baron Bros. Coliseum Auto Parts*, 649 A.2d 613, 621 (N.J. 1994) ("[A]sbestos products are not made from the same formula, come in various forms and carry different risks of harm.") (citations omitted).

(b) Premises Liability and Intentional Infliction of Harm Claims

Union Carbide operated five plants within West Virginia and at least two outside of West Virginia that are implicated in the "Mass Trial". In West Virginia Union Carbide operated plants at various different times at South Charleston, Institute, Alloy, Tech Center and Sistersville. The identified premises outside of West Virginia were located at Paducah, Kentucky and Marietta, Ohio. The asbestos products used at each location, warnings on those products, types and availability of protection,

the historical response to the inclusion and/or removal of asbestos from the premises, the work conducted and whether it was conducted by employees or contractors varied. In addition these factors also varied in comparison with other defendants.

The plaintiffs whose cases are subject to the TSO were members of a bewildering variety of different trades, that include boilermakers, insulators, carpenters, iron workers, laborers, roofers, painters, equipment operators, mechanics, electricians, cement masons, chemical plant operators, and steelworkers, to name but a few. Additionally, other plaintiffs make claims based solely on household exposure. Each plaintiff has a unique claim regarding asbestos exposure, which allegedly occurred at different times, in different locations, for different durations and under different exposure conditions.

Moreover, there are tremendous differences in the asserted injuries among the plaintiffs. The differences between each of the plaintiffs is compounded by the fact that many plaintiffs suffer from medical conditions unrelated to asbestos exposure. Among those differences are the varying exposure times recognized by medical science as necessary in order to cause or contribute to the plaintiffs' alleged injuries. The cases subject to the TSO present a variety of medical complaints including but not limited to asbestosis, in various degrees of severity ranging from no practical impairment[5] to advanced pulmonary fibrosis; pleural changes only; bronchogenic carcinoma; and mesothelioma.

C. Ramification of the "Mass Trial" Procedure for Union Carbide

To ascertain liability of a defendant and the relief, if any, to which a plaintiff is entitled requires the resolution of the following issues for each and every case:

---

5. Based on historical experience in asbestos litigation and the partially complete Plaintiffs' Certifications required under the TSO (*see* App. B at 30a), Union Carbide believes that many of the thousands of cases subject to the TSO involve unimpaired plaintiffs with pleural changes only.

- the precise product(s) to which the plaintiff was exposed;
- the manner, conditions, and circumstances of each exposure;
- the dates, duration and location of each exposure;
- the manner in which each alleged asbestos containing product was used;
- whether there was protective equipment available and actually used;
- the presence or absence of warnings included with the specific product(s) at issue;
- the injury sustained by the particular plaintiff; and
- each plaintiff's medical, family, and personal history, including such issues as other causes of the plaintiff's injury such as use of tobacco products, and other occupational exposures to different substances (e.g., benzene, carbon tetrachloride, coal dust).

See In re Asbestos & Asbestos Insulation Material Prods. Liability Litig., 431 F. Supp. 906, 909-910 (J.P.M.L. 1977); *In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir. 1990); and *Gaughan*, 563 S.E.2d at 428 (Maynard J. concurring).

The TSO's requirement that juries in stage A will "determine the common issues of fault" ignores the need to determine the above issues, disregards the complete lack of common issues and severely prejudices parties by effectively eliminating the ability of the defendants to present a defense. By way of example, Union Carbide is unable to present evidence relating to its unique product "Calidria" or present evidence about the industrial hygiene practices it adopted in the Polyolefins Unit at the Institute Plant in Charleston, West Virginia, without such evidence being entangled with the cases of the other 100 or so defendants. Likewise, other defendants' ability to maintain their individual defenses is lost in the morass of details that are necessary to explain corporate, premises and individual job conduct.

Evidence concerning the alleged knowledge and conduct of all defendants will be admitted into the mass proceeding, where it will almost inevitably taint Union Carbide, as well. *See Gwathmey v. United States*, 215 F.2d 148, 154 (5th Cir.

1954) (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). In addition the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the jury, making it impossible to distinguish one defendant or defense from another. *See Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).

REASONS FOR GRANTING THE WRIT

In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. State courts must provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights. *See* U.S. CONST. 5th and 14th Amendments; *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 102 (1993); *California v. Ramos*, 463 U.S. 992, 1013-1014 (1983). As a result, West Virginia's Rule 26.01 and the TSO must be consistent with the protections of the United States Constitution to be valid. In this instance the West Virginia court has exerted its powers to deprive the defendants of their rights to due process.

The Petitioners' petition for a writ of certiorari convincingly argues that the due process standards governing the consolidation of cases should apply to the West Virginia Mass Trial procedure under Rule 26.01 and the application of such standards do not permit the proposed "Mass Trial." In addition to the reasons for granting the writ of certiorari set forth in the Petitioners' petition, which Union Carbide and Amchem fully join, it is also asserted that the writ of certiorari should be granted because the aggregation of claims, regardless of whether it is termed a consolidation, is required to conform to the requirements of commonality and a lack of prejudice.

Indeed as addressed below, aggregation under a class action, permissive joinder, multi-district consolidation, and consolidation under Federal Rule of Civil Procedure 42 all include an examination of commonality and prejudice.

In addition, as demonstrated below, the requirements of commonality and a lack of prejudice have deep historical roots, embedded in the judicial milieu that informs how justice is to be rendered. Indeed, "this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see also Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due'") (emphasis in original).

The petition for a writ of certiorari should also be granted for the reasons advanced by the Petitioners that the West Virginia Supreme Court of Appeal's disregard for this Court's decision in *Shutts*, 472 U.S. 797 does violence to the principles of *stare decisis*, federalism and due process rights[6]. As the *Shutts* decision prohibits, there is a conflict between the forum law and that of the other jurisdictions connected to the suit resulting in an injury to the defendants, and consequently a violation of the constitutional limitations on choice of law. *Id.* at 816.

This Brief in Support addresses the conflict issue through an examination of the varying laws of the implicated jurisdictions on the intentional infliction of harm exception to Workers' Compensation laws and on the ability of unimpaired plaintiffs to recover compensation. While demonstrating a clear conflict in choice of law terms and therefore a violation of due process, the analysis also starkly highlights the way in which West Virginia presumptuously disregards the sovereign rights of other states and the principal of horizontal federalism.

Further, no choice of law analysis can protect due process rights in the "Mass Trial" because even if the trial court respected *Shutts* and applied the law of the states that had significant contacts, then the laws of the numerous states implicated in the case will render the trial unmanageable, confusing to the jury and ultimately a violation of the defendants' due process right

6. At a hearing on August 12, 2002, the Mass Litigation Panel (Judges Recht, Stephens and Moats presiding), stated that West Virginia law would be applied to all claims in the "Mass Trial".

to be given a meaningful opportunity to be heard and to mount a defense.

I. THE WEST VIRGINIA COURT'S HOLDING THAT MASS AGGREGATION FOR TRIAL REQUIRES NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE VIOLATES DUE PROCESS

The Due Process Clause requires that everyone shall have the protection of their day in court and the benefit of the general law, which hears before it condemns and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). *See also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend.'") (citations omitted). An aggregation of cases does not *per se* violate the requirement of due process. However, any form of aggregation must honor a party's right to due process so as not to run afoul of the United States Constitution.

Due process is afforded in the aggregation of cases context by ensuring the existence of common issues and the avoidance of prejudice. This due process formula may be gleaned from a review of current mechanisms for aggregation and by reference to historical practice.

In striking contrast, the Supreme Court of Appeals of West Virginia's opinion in *Gaughan* does not require the trial court to inquire into the commonality of the aggregated claims or the possible prejudice to the parties that would result from aggregation. *See* App. A at 13a. The trial court is relieved of these duties because there is a need for "significant flexibility and leeway" in dealing with asbestos litigation, as well as the "constitutional mandate of administering justice without delay[7]."

7. The West Virginia Constitution Art. III § 17 provides "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

See App. A at 11a-12a. While efficiency and justice without delay are important goals they cannot be achieved at the expense of due process.

A. Current Mechanisms for Aggregation Adopt the Existence of Common Issues and the Avoidance of Prejudice as Due Process Touchstones

A court can aggregate claims through various methods, such as, class action, permissive joinder, multi-district consolidation, and consolidation under Federal Rule of Civil Procedure 42 equivalents. *See* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 182 (2001) ("[I]n the United States, there are a variety of devices for pursuing large-scale litigation."). Although each method's goal is to increase efficiency, every method also requires an inquiry into commonality and prejudice, regardless of whether one claim is to be joined under permissive joinder or 1000 claims are to be certified as a class.

(a) Consolidation

For a consolidation under Fed. R. Civ. P. 42(a), a common question of law or fact shared by all of the cases is a prerequisite. However, "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). "The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350. In addition courts' have the discretion to order separate trials to avoid prejudice. *See* Fed. R. Civ. P. 42(b). "The court's power to sever claims and order separate trials [requires] it to balance the factors of benefit and prejudice that will result from the alternative courses." *Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973).

Trial courts have conducted the efficiency and prejudice balancing analysis in considering consolidations and will reject consolidation where a party's rights are prejudiced. *See In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 444 (D. N.J. 1998) (The court must weigh "the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice.")

(citations omitted); *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623, 625 (E.D. Wisc. 1984) (Even though there was clearly a commonality of legal issues, factual dissimilarities and the "strong possibility of confusing the jurors" cautioned against trying all of the cases in a single proceeding.); *Webb v. Goord*, 197 F.R.D. 98, 101 (S.D.N.Y. 2000) ("Combining into a single action unrelated incidents involving distinct events and disparate parties also carries the potential of confusing a jury and of exposing some defendants to the risk of liability by loose institutional association for the unconnected wrongdoing of others."). *See also* 9 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2383 (West 2d ed. 1995).

In general, consolidation has not been favored in the mass tort context. Consolidation is regarded as unwarranted because:

> Individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

In re Northern Dist. of Cal. Dalkon Shield Prods. Liab. Litig., 693 F.2d 847, 853 (9th Cir. 1982). *See also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996).

(b) Permissive Joinder

Plaintiffs' cases can be properly joined under Fed. R. Civ. P. 20(a) if: (1) there is a right to relief arising out of the same transaction or occurrence, and (2) there is a question of law or fact common to all the plaintiffs. But, as with other aggregation procedures, the two commonality requirements must be consistent and balanced with fairness to the parties. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 n.10 (1966) (*superceded on other grounds by statute*). *See also Barr Rubber*

Products Co. v. Sun Rubber Co., 425 F.2d 1114, 1126-27 (2d Cir. 1970) ("Rule 20 . . . specifically vests in the district court the discretionary power to make such orders as may be required to prevent delay or prejudice"); *Arrington v. City of Fairfield*, 414 F.2d 687, 693 (5th Cir. 1969).

(c) Multidistrict Litigation

Multi-districting is a statutory-based procedure that allows parties to request the Judicial Panel on Multidistrict Litigation to collect lawsuits arising out of the same or similar circumstances that have been filed in different federal courts and transfer them to a single court for purposes of pretrial proceedings. *See* 28 U.S.C. § 1407. The transfer has to serve the convenience of the parties and witnesses, as well as further the just and efficient conduct of the litigation. *Id. In re Asbestos & Asbestos Insulation Material*, 431 F. Supp. 906 rejected the consolidation of 103 actions based on exposure to asbestos dust because "the circumstances of exposure are predominantly individual to each action" and a finding that "transfer would not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation." *Id.* at 909-910.

(d) Class Actions

Class actions pursuant to Federal Rule of Civil Procedure 23 must satisfy four prerequisites: numerosity, commonality, typicality and adequate representation. Fed. R. Civ. P. 23(a). The rule clearly requires commonality but in addition protects against prejudice through the commonality, typicality and adequacy of representation requirements.

Many courts have rejected the feasibility of consolidating asbestos and similar products-liability cases into a Rule 23 class action. One notable example is *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), upholding an appellate court's decision to decertify an asbestos class intended to achieve a global settlement of current and future asbestos-related claims nationwide. The Supreme Court cautioned that aggregated treatment of asbestos cases is improper when "individual stakes are high and disparities among class members great." *Id.* at 625.

In upholding decertification, the Court explained the purpose behind a number of the class action prerequisites, such as that "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Further, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625. Most importantly for the current analysis this Court also observed:

> The adequacy-of-representation requirement "tends to merge" with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Id. at 626 n.20 citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982). *See also Amchem*, 521 U.S. at 615 where this Court explained that the predominance and superiority requirements of Rule 23(b)(3) are intended to achieve efficiencies "without sacrificing procedural fairness or bringing about other undesirable results."

The merger of prerequisites identified by this Court exists because the *sine qua non* of the adequacy of representation, commonality and typicality criteria of Rule 23(a) is the avoidance of prejudice. As the class action necessarily involves absent class members being subject to the *res judicata* effect of the Court's decision, the rules direct attention to ways in which the avoidance of prejudice can be satisfied — the guideposts.

All of the current forms of aggregation require an inquiry into commonality and prejudice. To disregard this inquiry is to dispense a "cattle-car" justice which disenfranchises all parties and renders inaccurate judgments. *See* Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 Def. Couns. J. 18 (1996). Wherever the floor of

acceptable practices to satisfy due process is, the unlimited mass consolidation given effect by the TSO falls below it. Moreover, as the inquiry must be conducted at the outset, before the trial is commenced, it is appropriate for the Court to grant certiorari now.

B. The Aggregation of Claims Historically Required the Existence of Common Issues and the Avoidance of Prejudice

Anglo-American judicial systems have long favored individual control over litigation. Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L .Rev. 69, 74 (1986). However, at some point individualized justice becomes inefficient leading to the observation that "[w]hat group litigation has been searching for since the late seventeenth century is an understanding of which cases call for this sort of inefficiency." Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 691 (1997). This question has driven current and historical analysis of the class action.

The history of group litigation demonstrates that Equity has always required an assurance of commonality and lack of prejudice. Stephen C. Yeazell, who has written extensively on the history of group litigation, asks the question "what cohesion, transactions, or likenesses will justify one person's representing another in litigation — [what] will qualify a group as a litigative entity?" Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 U.C.L.A. L. Rev. 514, 515 (1980) [hereinafter Yeazell, *From Group Litigation*]. According to Yeazell, group litigation historically required "the actual cohesion of a social group as its basis, then a looser series of transactions among the members of the group, and finally only the sharing of some abstractly defined common interest among the members of the class." *Id.* As the nature of litigation changed with society over the centuries, the courts had to be satisfied with the existence of commonality in different ways.

The chancellors of medieval England did not inquire into issues such as adequate representation, conflict, or binding adjudication when faced with a possible group litigation situation. The "groups of group litigation [were] social entities rather than mere litigative units." Yeazell, *From Group Litigation* at 516. The groups were not formed only for the purpose of litigation, and the size and geographical proximity of the members made it possible to obtain actual consent, so that the chancellors had assurance that commonality would be present and that there would be a lack of prejudice.

As the 'natural groupings' of manorial tenants and parishioners broke down during the course of the 18th and 19th centuries they were replaced by associations "that often touched much narrower portions of their members' lives." Yeazell, *From Group Litigation* at 523. Commonality and prevention of prejudice were achieved through an alignment of interests, the courts sought congruence between the represented parties' interests and those of the representative as the guarantee for effective representation. *Id.* at 522 and 550-552.

Group litigation emigrated to America in the 1820's. Although the doctrinal underpinnings of the early class action were unclear, the Supreme Court in *Smith v. Swormstedt*, 57 U.S. 288 (1850) observed that "care must be taken that persons are brought on the record fairly representing the interest or right involved" and that where the subject matter of the suit is common to the parties then their interests will be protected. *Id.* at 303. An approach which was followed in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921). *See* Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, 221-222 and 225-226 (Yale University Press 1987).

The requirement of an alignment of interests between the representative and the absent parties was "constitutionalized" in the Supreme Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), that held that adequate representation of interests was necessary to meet constitutional due process requirements

for binding nonparties. *Id.* at 45. *See also* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L. Rev. 213, 225 (1990).

The historical development of group litigation demonstrates that prejudice was avoided firstly through consent and then througn an alignment of interests which today's lawyers know as adequacy of representation. Aggregation of cases through joinder and consolidation achieve due process through references to avoiding prejudice and achieving fairness. The modern class action adopts a more refined approach to due process by providing guidance on how prejudice is eliminated through requirements such as notice, (*Eisen v. Carlisle*, 417 U.S. 156, 174-175 (1974)), the right to opt-out (*Shutts*, 472 U.S. at 812[8]) and adequate representation (*Hansberry*, 311 U.S. at 42-43 and *Amchem* as explained above).

The history of consolidation seems to be somewhat briefer than that for the class action. Justice Gray found the roots of "the consolidation rule" in England where Lord Mansfield devised the practice of allowing the trial of a multiplicity of actions upon the same question under different policies of insurance. Where those prerequisites were present all but one of the trials were stayed, with the several insurers bound by the verdict in that trial. *See Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 292-293 (1892). The English practice was followed in New York until a statute governing consolidations was passed. *See Comman v. Insurance Co.*, 1 Caines, 114, Cole & C. Cas. 188 (N.Y. 1803); *Thompson v. Shepherd*, 9 Johns. 262 (N.Y. 1812). In other American courts a consolidation was achieved through ordering several actions by one plaintiff against different defendants to be tried together whenever the defense was the same, and unnecessary delay and expense would be avoided. *See Hillmon*, 145 U.S. at 292-293

8. The Supreme Court's decision was limited to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." *See Shutts*, 472 U.S. at 812 n.3.

(citing *Witherlee v. Ins. Co.*, 24 Pick. 67 (N.Y. 1830); *Wiede v. Ins. Cos.*, 3 Chi. Leg. N. 353 (D. Minn. 1871); *Andrews v. Spear*, 4 Dill. 470 (D. Minn. 1871); and *Keep v. R.R.*, 3 McCrary 302, 10 F. 454 (D. Mo. 1882)).

Justice Gray then explained "no defendant could be deprived, without its consent, of any right material to its defense." *See Hillmon*, 145 U.S. at 293. In *Hillmon* the defendants were denied there right to individually have three peremptory jury challenges as provided by statute so that they were entitled to a new trial.

In *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479 (1933). *Hillmon* was followed in setting out the following rule "consolidation is permitted as a matter of convenience and economy in administration, but does not . . . change the rights of the parties." *Id.* at 496- 497.

The historical analysis of consolidation above demonstrates that there must be commonality which was predicated on the existence of the 'same defense' or 'same question', and the parties must not be prejudiced, that is, their rights may not be deprived or changed as a result of the consolidation.

The courts in conducting class actions and consolidations have not done so purely out of convenience and economy. Efficiency was achieved by, and balanced with, an inquiry into the commonality of the claims and the potential for prejudice. The "Mass Trial" has been approved by the West Virginia Supreme Court of Appeals without an inquiry which courts have routinely conducted for centuries. The TSO robs the defendants of the ability to adequately and meaningfully present their case so as to raise available defenses. This denial occurs because the TSO subsumes the numerous factors upon which one plaintiff's claim may differ from another plaintiff's claim thus ignoring the existence of a complex factual matrix with interlocking and dependent issues.

This Court has stated that "When the absent [common law] procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Oberg*, 512 U.S. at

430. The petition for certiorari should be granted to ensure the protection of the parties' long standing historical rights and prevent the violation of due process through capricious adjudication.

II. THE WEST VIRGINIA COURT'S CHOICE-OF-LAW HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND VIOLATES DUE PROCESS

The Supreme Court of Appeals of West Virginia's decision on the substantive law to be applied in the "Mass Trial" can be interpreted in one of two ways: either the trial court should apply West Virginia law to all claims or the trial court should apply West Virginia choice of law rules[8]. *See* App. A at 7a and 21a-22a. Either reading suffers from an inherent constitutional infirmity.

The first approach violates this Court's decision in *Shutts*, which includes principles of federalism and due process. The second reading involves the application of the doctrine of *lex loci delicti* so that numerous other states' laws must be applied leading to inevitable jury confusion and the violation of the defendants' due process right to be given a meaningful opportunity to be heard and to mount a defense. In the "Mass Trial" context no choice of law analysis can pass muster under constitutional principals of due process.

A. The Application of West Virginia Law to All Claims Violates Principles of Federalism and Due Process

The Supreme Court of Appeals of West Virginia's decision allowing the trial court to apply West Virginia law to all claims violates *Shutts*, due process, and horizontal federalism.

Choice of law in the United States is inherently constitutional law. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250 (1992) (citing Justice Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 2, 6-7 (1945)). Choice of law questions are concerned with the allocation of

authority among the several states. *Id.* The allocation of authority among the several states inevitably causes federalism questions to arise. John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 Seton Hall L. Rev. 698, 706 (2001). Federalism has two dimensions, one vertical and one horizontal. *Id.* Vertical federalism refers to the conflict and relationship between state law and federal law. Horizontal federalism involves the relationships between and among the several states. *Id.* Various constitutional provisions seek to protect horizontal federalism — the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the Extradition Clause. *Id.*

In *Shutts* this Court recognized the importance of horizontal federalism to choice of law when the Court held that the application of Kansas law to every claim in a class action suit where almost all the plaintiffs had no apparent connection to Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822. The Court stated that the constitutional limits on choice of law are not "altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the state proposes to adjudicate and which have little connection with the forum." *Id.* at 821. West Virginia's decision to do otherwise and apply its own law to every claim in the present matter regardless of the connection to West Virginia violates such constitutional limitations and threatens horizontal federalism.

The *Shutts* decision is an attempt to prevent forum shopping and interference with other states' sovereignty. Without *Shutts*, a state with an insubstantial interest in a dispute can bind the nation, unfairly resolving controversial issues for the rest of the nation. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 57-59 (1986) [hereinafter Miller & Crump, *Jurisdiction and Choice of Law*]. This Court has consistently recognized the importance of preventing one state from imposing its own policy choice on neighboring states.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 571-572 (1996). *See also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular."); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

The invasion of a state's sovereignty may arise from another state's legislation, federal legislation, a federal court, or another state's court. *See, e.g., Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941) ("lack of uniformity . . . is attributable to our federal system, . . . [and a state's] right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law".") In this case, it is the West Virginia court rather than a federal court that is threatening to thwart the local policies of numerous states, but that difference is irrelevant for purposes of protecting federalism.

Shutts attempts to prevent forum shopping on the horizontal federalism level.[9] *Shutts*' efforts will be seriously undermined if the West Virginia court is allowed to apply its state's law to all claims, regardless of the interest of the state in such claims. *See* Miller & Crump, *Jurisdiction and Choice of Law*, at 62 n.426 ("Given the jurisdictional holding of *Shutts*, choice of law is the principal protection of interstate federalism.").

From a due process perspective, for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. *Shutts*, 472 U.S.

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9. This Court's decisions in the seminal cases *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co.*, 313 U.S. 487 were designed to prevent forum shopping by plaintiffs on a vertical federalism level.

at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

The West Virginia Supreme Court has acknowledged the existence of no connection between as many as five thousand plaintiffs and West Virginia. *See* App. A at 21a-22a (Maynard J. concurring). The West Virginia Supreme Court's failure to engage in a "significant contacts" analysis means that Union Carbide is now required to defend cases arising from actions occurring at premises in, and subject to the laws of, Kentucky and Ohio, under the different laws of West Virginia.

In *Shutts* this Court stated that "[w]hen considering fairness in this context, an important element is the expectation of the parties." *Shutts*, 472 U.S. at 822. When Union Carbide operated its premises in Paducah, Kentucky and Marietta, Ohio it did so pursuant to the laws of those states, including the Workers' Compensation laws. It is fundamentally unfair that actions taken by Union Carbide in reliance upon the law governing it are now to be disregarded and Union Carbide's actions are to be judged against the differing standards of West Virginia law. Examples of those differing standards are set out below.

West Virginia cannot be allowed to impose its law, in violation of *Shutts*, on all of the plaintiffs' claims because such an imposition would be fundamentally unfair and violate both the due process rights of the parties to this litigation and the sovereignty of the various other states with direct interests in the pending action.

B. A Conflict of Laws Does Exist Leading To a Violation of the Constitutional Limitations on Choice of Law and Horizontal Federalism

The *Shutts* decision requires that there be a conflict between the forum law and that of the other jurisdictions connected to the suit for there to be an injury, and consequently a violation of the constitutional limitations on choice of law. *Id.* at 816.

The plaintiffs have commenced actions in West Virginia where the place of the alleged tort was Ohio, Pennsylvania, Kentucky, Virginia, Indiana, or New York, to name the most

prevalent non-West Virginia locations. A review of those states' laws on the "deliberate intent" exception to Workers' Compensation and unimpaired plaintiffs demonstrates that the applicable substantive laws vary widely and lead to vastly different outcomes.

(a) "Deliberate Intent" Exception to Statutory Scheme of Workers' Compensation

The different ways in which the "deliberate intent" exception operates across states can be illustrated by focusing on the three states where Union Carbide operated facilities and employed people to run those facilities, West Virginia, Ohio and Kentucky

The TSO envisages only applying West Virginia law to "deliberate intent" exception causes of actions. *See* App. A at 7a and App. B at 25a referring to the third trial group being for claims under W. Va. Code § 23-4-2. West Virginia law allows an employee to pursue compensation under the Workers' Compensation scheme and to also bring an action pursuant to the deliberate intent exception. W. Va. Code § 23-4-2(b). West Virginia law provides two alternative tests that an employee in West Virginia can meet to demonstrate his employer's "deliberate intent" to injure him and so strip the employer of statutory immunity from a tort suit[10]. The statutory tests are:

1. The injured employee shows that his employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury" — merely willful, wanton or reckless misconduct will not suffice (W. Va. Code § 23-4-2(c)(2)(i)); or

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10. West Virginia enacted the statutory definition of "deliberate intent" in 1983 to override the West Virginia Supreme Court's decision in *Mandolidis v Elkins Industries, Inc.*, 161 W.Va. 695 (W. Va. 1978). *Mandolidis* liberalized what had previously been a narrow construction of deliberate intent. As a result, even applying only West Virginia law, a jury will need to be instructed on different standards of 'deliberate intent' depending upon when the plaintiff was exposed to asbestos.

2. The injured employee satisfies a fact-specific five-part test to demonstrate an unsafe working condition to establish his employer's deliberate intent to injure, by proving:

1. existence of a specific unsafe working condition presenting a high degree of risk and serious injury or death;
2. that the employer had a subjective realization of the existence of the unsafe working condition and of the high degree of risk and serious injury or death;
3. that the unsafe working condition was a violation of a state or federal safety statute, rule or regulation, or of a commonly accepted and well-known safety standard within the industry or business of such employer;
4. that the employer nevertheless exposed the employee to such specific unsafe working condition intentionally; and
5. the employee suffered serious injury or death as a direct and proximate result of such specific unsafe working condition. (W. Va. Code § 23-4-2(c)(2)(ii)).

In contrast, Kentucky adopts the position that an injured employee must elect between his remedies; "if he chooses to sue . . . he waives any recovery under the workers' compensation laws and if he chooses to make a claim under the workers' compensation laws, he waives his cause of action at common law." *Blanton v. Cooper Indus., Inc.*, 99 F. Supp. 2d 797, 803-804 (E.D. Ky. 2000) and Ky. Rev. Stat. § 342.610(4). The only exception to the election requirement is where the injury or death results from "willful and unprovoked physical aggression" by an employee, officer or director. Ky. Rev. Stat. § 342.690(1). Further Kentucky law defines deliberate intent as "the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent." *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25, 27 (Ky. 1955) and applied in *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 535-536 (6th Cir. 1999).

A comparison of Kentucky and West Virginia law quickly reveals that they differ as to the need to elect between remedies and that West Virginia's five-part test provides an additional avenue for plaintiffs to recover that does not exist in Kentucky. The impact on a Kentucky premises owner such as Union Carbide is that while it believed it had dealt with its liability to employees who had accepted compensation under the Kentucky statute, it now finds that those workers by filing their actions in West Virginia have evaded Kentucky's legislative mandate and are seeking further compensation.

The egregious nature of West Virginia's attempts to override the sovereignty of other states is starkly illustrated by a comparison with Ohio. Former Ohio Rev. Code § 2745.01 purported to replace the common law cause of action for intentional employer tort in Ohio with a statutory scheme that required proof by "clear and convincing evidence that the employer deliberately committed all of the elements of an employment intentional tort." However, the Ohio Supreme Court invalidated § 2745.01 as in violation of the Ohio Constitution Art. 2 § 34[11]. *Johnson v. BP Chemicals, Inc.*, 707 N.E.2d 1107, 1115 (Ohio 1999). The Ohio Supreme Court's decision is part of a larger struggle between the Ohio legislature and judiciary as to what standards of conduct and proof are constitutionally permissible in the area of the "deliberate intent" exception to Ohio's Workers' Compensation scheme. *See* Marc A. Claybon, *Ohio's "Employment Intentional Tort": A Workers' Compensation Exception, or the Creation of an Entirely New Cause of Action?*, 44 Clev. St. L. Rev. 381 (1996). Ohio's ongoing debate is of central importance to how Ohio wishes to govern an important aspect of its citizens' rights. West Virginia's "Mass Trial" makes no attempt to accommodate other states' "deliberate intent" exception laws so that it undermines the

11. Ohio Constitution Art. 2 § 34 provides: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

important requirement of horizontal federalism that is intrinsic to the operation of the United States' form of government. In relation to Ohio, not only are its laws being disregarded, but the interpretation of its Constitution is being ignored. The ongoing debate in Ohio is rendered moot by West Virginia allowing Ohio citizens who worked at an Ohio plant to bring action in West Virginia Courts that will solely apply West Virginia law.

(b) Unimpaired Plaintiffs

In West Virginia "an individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." *See Marlin v. Bill Rich Construction, Inc.*, 482 S.E.2d 620, 637 (W. Va. 1996) (citing *Ricottilli v. Summersville Memorial Hospital*, 425 S.E.2d 629, 630 (W. Va. 1992)). In order to ensure the emotional distress is "real and serious", the plaintiff has to prove that he or she was actually exposed to the disease by the negligent conduct of the defendant, the plaintiff's emotional distress is foreseeable, and the plaintiff actually suffered serious emotional distress as a direct result of the exposure. *Marlin*, 482 S.E.2d at 638.

In direct contrast, other states either do not allow recovery to unimpaired plaintiffs, such as Pennsylvania and Kentucky, or allow recovery but apply a different test, such as New York.

In Pennsylvania the law is set out in *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), where all of the plaintiffs suffered from asbestos-related pleural thickening (the scarring of lung tissue). *Id.* at 236. The plaintiffs sought recovery for, *inter alia*, increased risk of cancer, fear of cancer, and mental anguish. *Id.* at 235. The Pennsylvania court held that asymptomatic pleural thickening is not a compensable injury that gives rise to a cause of action. *Id.* at 237. The general rule is that there can be no recovery for emotional distress absent physical injury or physical impact, and pleural thickening is not a sufficient impact. *Id.* at 238.

In Kentucky, mere exposure to a toxic substance does not constitute sufficient physical harm to base a claim for damages.

Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 195 (Ky. 1994). Kentucky law requires a tangible injury to trigger the existence of a cause of action. *Id.* at 194. The fear of cancer cause of action would not accrue until the plaintiff had suffered a "harmful change." *Id.* at 193.

In New York, plaintiffs can maintain an action for "cancerphobia", but it requires different elements to be proved than under West Virginia law. Under New York law the plaintiff can recover if they can establish that they were in fact exposed to the disease-causing agent and that there is a 'rational basis' for the fear of contracting the disease. *Wolff v. A-One Oil, Inc.*, 627 N.Y.S.2d 788, 789 (2d Dep't 1995); *Dangler v. Town of Whitestown*, 672 N.Y.S.2d 188, 190 (4th Dep't 1998). In New York the rational basis is achieved through demonstrating a clinical presence of asbestos fibers in the lungs, or some indication of an asbestos-induced disease. *Wolff*, 627 N.Y.S.2d at 789. While New York and West Virginia both require proof of exposure, New York then looks for the physical presence of asbestos as compared to West Virginia law which focuses on the suffering of serious emotional distress as a direct result of the exposure.

The law on unimpaired plaintiffs is controversial because of the difficulty in proving harm and the high likelihood of sham claims. In the area of asbestos litigation the controversy is heightened because unimpaired claimants recovery of damages reduces the funds available for truly sick claimants. West Virginia's application of only its law means that it is imposing its method of resolving the controversy on all other states.

C. The Application of Multiple States' Laws in the Mass Trial Creates Jury Confusion and Violates Due Process

Under normal circumstances West Virginia recognizes the doctrine of *lex loci delicti* ("place of the wrong") . *Vest v. St. Albans Hospital*, 387 S.E.2d 282, 283 (W. Va. 1989); *Paul v. National Life*, 352 S.E.2d 550, 555 (W. Va. 1986). Pursuant to this doctrine, "the substantive rights between the parties are

determined by the law of the place of the injury." *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913, 924 (W. Va. 1997).

If the West Virginia court applies the *lex loci delicti* doctrine correctly, the jury will be hopelessly confused and the procedure will violate due process. Variations among the applicable states' laws would exacerbate the multiplicity of issues to be determined during each phase of the trial and make the mass trial format all the more impracticable. In case after case, courts in mass tort actions involving plaintiffs from multiple states have held that (a) state tort laws differ materially on a wide range of issues, (b) such differences result in a lack of common issues, and (c) any joint trial (even of limited issues) would therefore be unmanageable and unfair. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-743 (5th Cir. 1996) ("[p]roducts liability law also differs among states," including the standards for strict liability and affirmative defenses); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) ("[t]he states have different rules governing the whole range of issues raised by the plaintiffs' [asbestos personal injury] claims"), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423-424 (E.D. La. 1997) (varying state law jury instructions for strict liability product defect claims "could not possibly be given to the same jury"); *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447 (finding that the prospect of applying the different laws of each of the relevant states to consolidated claims would "create a nightmare of jury confusion which would be prejudicial to [the parties]").

The application of solely West Virginia law is impermissible in an aggregation involving injuries that took place all over the country. Differences in state laws may be costly and increase complexity, "but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Tires Prods. Liab. Litig. Appeals*, 288 F.3d 1012, 1020 (7th Cir. 2002). In *Bridgestone/ Firestone* the plaintiffs obtained certification of nationwide class actions and sought to apply a single state's law (place of

defendants' headquarters) to the cases from all 50 states. *Id.* at 1015-16. The Seventh Circuit decertified the class because Indiana, the state where the Federal Court sat, is a *lex loci delicti* state and thus selects the law of the place where the harm (physical or financial) occurred. *Id.* at 1016. The Seventh Circuit found not only that applying a single state's law violated due process and federalism, but also that "adjudication under the law of so many jurisdictions . . . is not manageable." *Id.* at 1018, 1020.

Due process guarantees parties the right to present their case at a meaningful time and in a meaningful manner. *See* U.S. CONST. 5th and 14th Amendments; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1981); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). The confusion created by requiring a jury to apply numerous different state laws in one proceeding deprives all parties of their right to present their cases in a meaningful manner.

The reasoning in *Bridgestone/Firestone* applies equally to the "Mass Trial" of asbestos cases. If the trial court adopts only West Virginia law to simplify the trial, it violates the due process and federalism requirements of the United States Constitution, and if it seeks to apply the laws of the numerous states implicated in the case the trial will be unmanageable, confusing to the jury and ultimately a violation of due process. Therefore, West Virginia's attempt to aggregate thousands of disparate claims is inappropriate because in any conceivable form it violates the due process requirements of the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MOBIL CORPORATION and HONEYWELL INTERNATIONAL, INC.,
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v.

BRUCE W. ADKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF RESPONDENT PREMISES OWNER AND EMPLOYER DEFENDANTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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PARTIES JOINING IN THIS BRIEF

The premises owner and employer defendants joining in this Brief are Respondents Aristech Chemical Corporation, Bayer Corporation, Duquesne Light Company, E. I. du Pont de Nemours and Company, The Goodyear Tire and Rubber Company, Monongahela Power Company, Pennzoil-Quaker State Company (sued as Quaker State Corporation), Pharmacia Corporation (formerly known as Monsanto Company), Potomac Edison Company, West Penn Power Company, and Westvaco Corporation.

CORPORATE DISCLOSURE STATEMENTS

Respondent Aristech Chemical Corporation is a wholly owned subsidiary of Sunoco, Inc. (R&M). Sunoco, Inc. (R&M) is, in turn, a wholly owned subsidiary of Sunoco, Inc.

Respondent Bayer Corporation's parent is Bayer AG. No publicly held corporation owns 10% or more of Bayer Corporation's stock.

Respondent Duquesne Light Company states that its parent corporation is DQE, Inc., which is the only publicly held company which owns more than 10% of its stock.

Respondent E. I. du Pont de Nemours and Company ("DuPont") has no parent corporations, and no publicly held companies own 10% or more of DuPont's stock.

Respondent The Goodyear Tire and Rubber Company states that two publicly held corporations own more than 10% of its stock: Brandes Investment Partners, L.P. and AXA Financial, Inc.

Respondent Monongahela Power Company is a subsidiary of Allegheny Energy, Inc., which owns 100% of its common stock.

Respondent Pennzoil-Quaker State Company (sued as Quaker State Corporation) has no parent company and no publicly traded corporation owns 10% or more of its stock.

Respondent Pharmacia Corporation, formerly known as Monsanto Company, has no parent corporations, and no publicly held companies own 10% or more of Pharmacia Corporation's stock.

Respondent Potomac Edison Company is a subsidiary of Allegheny Energy, Inc., which owns 100% of its common stock.

Respondent West Penn Power Company is a subsidiary of Allegheny Energy, Inc., which owns 100% of its common stock.

Respondent Westvaco Corporation, is a wholly-owned subsidiary of MeadWestvaco Corporation, a publicly held corporation.

TABLE OF CONTENTS

	Page
PARTIES JOINING IN THIS BRIEF	i
CORPORATE DISCLOSURE STATEMENTS	ii
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	2
Interest of the Premises Defendants	2
Background and Relevant Procedural History On The Premises Liability And Employer Liability Claims	2
REASONS WHY THE WRIT SHOULD BE GRANTED	9
I. THE WRIT SHOULD BE GRANTED BECAUSE THE WEST VIRGINIA SUPREME COURT OF APPEALS HAS ERRED IN ELEVATING AN ASSERTED STATE LAW RIGHT TO EXPEDITIOUS DISPOSITION OF CASES OVER THE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION	9
A. The West Virginia Supreme Court Of Appeals Has Improperly Dispensed With The Application Of Procedural Rules That Afford Defendants Due Process Of Law In Connection With The Aggregation Of Cases	11
B. The West Virginia Supreme Court of Appeals Has Improperly Elevated A State Constitutional Right To Swift Justice Over The Due Process Protections Guaranteed A Civil Defendant	18

TABLE OF CONTENTS—Continued

Page

II. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI AT THIS TIME BECAUSE THE ISSUES ARE RIPE FOR REVIEW AND BECAUSE ANY DELAY WOULD EFFECTIVELY INSULATE THE WEST VIRGINIA SUPREME COURT OF APPEALS' ACTIONS FROM REVIEW 20

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES Page

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 4, 8, 14, 16, 18
Arnold v. Garlock, Inc., 278 F.3d 426 (5th Cir. 2001) 19
Boddie v. Connecticut, 401 U.S. 371 (1971) 11, 12
Cain v. Armstrong World Indus., 785 F. Supp. 1448 (S.D. Ala. 1992) 14
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir 1993) 14
Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996) 8
In re Federal-Mogul Global, Inc., No. 02-1426, 2002 WL 1763923 (3d Cir. July 31, 2002) 19
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 18
Insolia v. Philip Morris, Inc., 186 F.R.D. 547 (W.D. Wis. 1999) 14
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 12, 16, 19
Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) 14
Montana v. United States, 440 U.S. 147 (1979) 12
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 11
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) ... 14
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 12
TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 17
Vitek v. Jones, 445 U.S. 480 (1980) 19

STATE CASES

Burdette v. Columbia Gas Transmission Corp., 480 S.E.2d 565 (W. Va. 1996) 6

TABLE OF AUTHORITIES—Continued

Page

Glussi v. Fortune Brands, Inc., 714 N.Y.S.2d 516 (N.Y. App. Div. 2000) 14
In re Seventh Judicial District Asbestos Litigation, 744 N.Y.S.2d 304 (N.Y. Sup. Ct. 2002).... 14
Mallet v. Pickens, 522 S.E.2d 436 (W. Va. 1999) 5
Pasquale v. Ohio Power Co., 418 S.E.2d 738 (W. Va. 1992)..... 5
Peneschi v. National Steel Corp., 295 S.E.2d 1 (W. Va. 1982) 6
Sanders v. Georgia-Pacific Corp., 225 S.E.2d 218 (W. Va. 1976) 5, 6
West Virginia ex rel. Allman v. MacQueen, 551 S.E.2d 369 (W. Va. 2001).....9, 15, 22
West Virginia ex rel. Appalachian Power Co. v. Ranson, 438 S.E.2d 609 (W. Va. 1993)..... 10, 13
West Virginia ex rel. Mobil Corp. v. Gaughan, 563 S.E.2d 419 (W. Va. 2002)..... *passim*

FEDERAL CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const. art. VI, § 2..... 11
Fed. R. Civ. P. 20..... 13
Fed. R. Civ. P. 23.....12, 13, 15
Fed. R. Civ. P. 42..... 13, 15

STATE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

W. Va. Const. art. III, § 17..... 10, 18
W. Va. Code § 23-4-2(c)(2)..... 3, 7, 8
W. Va. R. Civ. P. 20 13
W. Va. R. Civ. P. 42 13
W. Va. Trial Ct. Rule 26.01 ..... 15, 17

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BRIEF OF RESPONDENT PREMISES OWNER AND EMPLOYER DEFENDANTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondents joining in this brief are among the various premises owner and/or employer defendants in the West Virginia mass asbestos litigation that is the subject of the instant Petition (hereinafter, "Premises Defendants"). Pursuant to Supreme Court Rule 12.6, Premises Defendants submit this brief in support of the Petition for a Writ of Certiorari filed by their co-defendants in the underlying mass trial, Mobil Corporation and Honeywell International, Inc. (collectively, "Mobil"). Each of the Premises Defendants joined in Mobil's petition for a writ of mandamus and/or prohibition to the West Virginia Supreme Court of Appeals, to which the instant Petition to this Court refers. *See* Appendix accompanying Mobil's Petition for a Writ of Certiorari (hereinafter, "Pet. App.") at 157a-161a.

STATEMENT OF THE CASE

Interest of the Premises Defendants

In this brief, Premises Defendants focus on the first question presented by the Petition. For most (but not all) premises and/or employer defendants, the vast majority of the premises liability and employer liability claims involve facilities (and thus alleged asbestos exposures) in West Virginia. Therefore, while Premises Defendants support the Petition on the second question, the *Shutts* issue, this brief is largely limited to the first question presented by the Petition.

Premises Defendants will elaborate briefly on the facts to explain the various types of claims being asserted against them as part of the West Virginia mass trial. Premises Defendants will then address, in Part I, the reasons why this Court should grant the Petition and, in Part II, why this Court should address these questions now, rather than at some later time.

Background and Relevant Procedural History On The Premises Liability And Employer Liability Claims

Premises Defendants have been named as defendants by thousands of plaintiffs in various asbestos cases administered by the West Virginia Mass Litigation Panel ("MLP").[1] Petitioners Mobil and Honeywell (and many other companies) have been named as defendants because they manufactured or distributed at least one product that contained some form of asbestos. Each of the Premises Defendants has been named as defendant by some unspecified number of plaintiffs on a premises liability theory—*i.e.*, that they allowed persons to enter one or more of their West

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[1] The Court will notice throughout this brief that it is difficult for many defendants to state specifically how many plaintiffs there are or in how many cases they have been named in connection with the mass trials scheduled to begin in September 2002.

Virginia industrial facilities over the course of several decades, and thereby allegedly exposed them to asbestos-containing materials used (predominantly as insulation) in those facilities.

In addition, some of the Premises Defendants, which include some of the largest employers in West Virginia, also have been named as defendants by some unspecified number of former employees based on a statutory "employer liability" theory. These claims are based on an exception to the West Virginia workers' compensation bar which permits an employee to sue an employer that "deliberately intended," either actually or constructively, to cause death or serious bodily injury to the employee. *See* W. Va. Code § 23-4-2(c)(2) (West 2002).

The thousands of claims against Premises Defendants, along with the claims against companies that manufactured or distributed products containing asbestos, are set for a mass trial currently to begin on September 23, 2002.[2] Any given plaintiff may have sued any number of different defendants, potentially resulting in uncountable combinations of defendants for particular plaintiffs—depending on which "premises" the plaintiffs claim to have entered, which products with which they claim to have come into contact, or by whom they were employed.

The general outline of the mass trial authorized and approved by the West Virginia Supreme Court of Appeals, as set forth in the trial scheduling order entered by Judge Gaughan on February 26, 2002, is clear. Specifically, under the trial scheduling order, there will be a "first phase" composed of three trials of three different groupings of defendants: product manufacturers and distributors, premises

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[2] It appears that there has never been a "mass trial" of premises liability claims or of statutory employer liability claims either in West Virginia or, indeed, in any other jurisdiction.

owners and employers.[3] Pet. App. at 25a. Each of these three trials is supposed to provide the occasion for a jury to fully determine the "fault" of each of the many defendants in the group vis-à-vis all the plaintiffs. *Id.* at 25a-27a. That fault phase will also set "punitive damages multipliers."[4] *Id.* at 26a. The trial scheduling order also specifically contemplates—indeed, appears to count on—the mass trial setting forcing large numbers of defendants to "settle," thereby simplifying the entire trial process. *Id.* at 27a.

The initial phase determining "fault" is to be followed by a series of mini-trials in which "causation" and damages will be addressed as to particular plaintiffs. *Id.* at 28a. The trial scheduling order suggests that additional settlements are expected to precede the mini-trial phase. *Id.* at 28a-29a.

From prior cases, the Court may have some understanding of the complexity associated with addressing thousands of products liability claims involving a wide variety of asbestos-containing products of dozens of different manufacturers. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The variety of products, the particular risks associated with each product, and the nature of the exposures of each plaintiff, all bear importantly on the ability to adjudicate even basic questions of liability fairly in that setting. *Id.*

The Court may, however, be less familiar with premises liability claims. Those claims seek to attribute liability to owners of various types of work-sites (*e.g.*, power plants,

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[3] The September 2002 mass trials of the manufacturer/distributor claims and the premises liability claims will be simultaneous. At a hearing on August 12, 2002, the MLP (Judges Recht, Stephens and Moats presiding) indicated that the mass trial of the employer liability claims would begin on December 2, 2002.

[4] The MLP likewise confirmed at the August 12 hearing that the first phase of the mass trial would include the setting of punitive damages multipliers.

manufacturing facilities and chemical plants) that had asbestos-containing materials (typically insulation) in them and which were visited by plaintiffs for some business purpose (*e.g.*, repairs, installations, deliveries). Plaintiffs, allegedly suffering from some asbestos disease or, much more usually, being asymptomatic but possessing some evidence of some form of pleural thickening which could be the result of exposure to asbestos, propose to recover damages from premises owners.

In West Virginia, a premises owner is under a duty to provide business invitees (such as the employees of independent contractors) with a reasonably safe place in which to work and to exercise ordinary care for the safety of such persons. *Sanders v. Georgia-Pacific Corp.*, 225 S.E.2d 218, 223 (W. Va. 1976). A premises owner's liability for breach of this duty depends on numerous case-specific factors, including:

> (1) the foreseeability that an injury might occur; (2) the severity of injury; (3) the time, manner and circumstances under which the injured party entered the premises; (4) the normal or expected use made of the premises; and (5) the magnitude of the burden placed upon the defendant to guard against injury.

Mallet v. Pickens, 522 S.E.2d 436, 447 (W. Va. 1999). Likewise, a premises owner has a duty to warn invitees of defects or dangerous conditions on the premises. This duty depends, in part, on the invitee's own ignorance of those conditions, and on the likelihood that harm would follow, given the time, manner and circumstances under which the particular plaintiff entered the premises. *See Pasquale v. Ohio Power Co.*, 418 S.E.2d 738, 751 (W. Va. 1992).[5]

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[5] In addition, under West Virginia law, the premises owner will not be liable for the harm caused to a third party by an independent contractor or the contractor's employees if the premises owner did not control, or have

The factual variation in the premises liability claims set for the mass trial, which generally involve activities spanning over nearly half a century, is vast. There is, of course, the sheer number of defendant premises owners to contend with. Any given defendant may own (or have owned) one or more premises in the state; any given plaintiff may have worked at numerous such premises owned by various companies. The asbestos-containing material at a particular industrial site may have been isolated to a single location or, much more likely, may have been located in multiple areas of the premises, some of which cover several acres. Concentrations of asbestos will vary widely over the premises; asbestos in one location may have had the potential to become airborne, whereas in other areas it may have been fixed or encapsulated.

There is tremendous variety among plaintiffs as well. The plaintiffs may have visited the premises in different years spanning several decades, for varying lengths of time, and under diverse circumstances, thus creating enormous differences in the extent, duration and nature of their alleged asbestos exposures. For example, some plaintiffs (such as insulators) worked directly with and installed asbestos-containing materials, while others had no such direct contact. Further, some plaintiffs (again, such as insulators) were employed in occupations in which the hazards of asbestos may have been well known.

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the right to control, the contractor's operations. *Peneschi v. National Steel Corp.*, 295 S.E.2d 1, 11 (W. Va. 1982); *Sanders*, 225 S.E.2d at 221. This control issue is typically highly fact intensive and dependent on the particular circumstances of each case. *See, e.g., Burdette v. Columbia Gas Transmission Corp.*, 480 S.E.2d 565, 570 (W. Va. 1996) (focusing, among other things, on the terms of the specific contract between the premises owner and the plaintiffs' employer and the activities and duties of the premises owner's employees assigned to supervise the contractor's work).

The knowledge of any risks associated with asbestos in general, or more importantly, the asbestos present in any particular facility or location in a facility, differed from defendant to defendant. Even for any one defendant, that knowledge evolved over time, from decade to decade and from year to year. Likewise, the steps that a given defendant took to minimize known risks at any one of the various premises differed depending on the premises owner, the type of work involved and the time at issue. "Fault" is *not* a unitary issue even for one defendant—the risks posed by asbestos and liability may vary depending on location, concentration, time period, length and frequency of exposure, as well as each plaintiff's knowledge.

The employer liability claims are equally diverse and both plaintiff- and defendant-specific. To prevail on such a claim, plaintiff must show that his employer deliberately intended to injure him. *See* W. Va. Code § 23-4-2(c)(2)(i). Obviously, proof of actual intent necessarily involves a highly particularized, plaintiff-specific and defendant-specific showing. Moreover, since the key element is "intent," claims against one employer can legally bear little relation to claims against another employer.

Alternatively, the employee can prevail on such a claim by a showing of constructive intent to injure, which showing is satisfied by proof of five plaintiff- and defendant-specific elements:[6] (1) existence of a specific unsafe working condition presenting a high degree of risk of serious injury or death; (2) that the employer had subjective realization of the existence of the unsafe working condition and of the high degree of risk of serious injury or death; (3) that the unsafe working condition was a violation of a state or federal safety

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[6] Notably, each of these elements must be determined by submission of special interrogatories to the jury, *see* W. Va. Code § 23-4-2(c)(2)(ii), effectively barring a "mass" determination of any portion of a constructive intent claim.

statute, rule or regulation or of a "commonly accepted and well known safety standard within the industry or business of such employer;" (4) that the employer nevertheless exposed the employee to such specific unsafe working condition intentionally; and (5) that the employee suffered serious injury or death as a direct or proximate result of such unsafe working condition. W. Va. Code § 23-4-2(c)(2)(ii).

The unlikely nature of the employer claims—that the employer actually intended to harm its employees—and the difficulty in proving such a state of affairs might suggest that few plaintiffs could prevail on such claims. In the ordinary administration of cases, the Court might imagine that the claims would be dismissed early on through summary judgment procedures. But, in the context of this hastily conceived "mass trial"—in which the array of claims, issues and evidence defies comprehension—even the most improbable claims have substantial force, compounded by the sheer number of claims being asserted.

In every respect, the premises liability and employer liability cases reflect the impossibility of combining in any coherent trial the claims of persons who are suing innumerable defendants and who "'were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

The Petition sets forth additional details of the mass trial and the decisions of the West Virginia Supreme Court of Appeals imposing that court's vision of a mass trial on the defendants.[7] Yet, in judging the nature and fairness of the

[7] There has been a succession of trial judges charged with trying to implement the West Virginia Supreme Court of Appeals' requirement that the asbestos cases transferred to the MLP be disposed of as speedily as

mass trial, it is significant to note that, with the trial weeks away, there still is no definitive statement of the "common issues" on the premises liability claims that will determine Premises Defendants' fault.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE WRIT SHOULD BE GRANTED BECAUSE THE WEST VIRGINIA SUPREME COURT OF APPEALS HAS ERRED IN ELEVATING AN ASSERTED STATE LAW RIGHT TO EXPEDITIOUS DISPOSITION OF CASES OVER THE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION

The Petition squarely presents as the first question whether the West Virginia Supreme Court of Appeals' directives and decisions on the upcoming mass trial comport with minimum due process requirements. That question subsumes two

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possible. On November 17, 2000, the West Virginia Supreme Court of Appeals referred all pending cases to the MLP. By order entered December 20, 2000, the court transferred those cases to the Honorable A. Andrew MacQueen for administration. Judge MacQueen's plan for administering the asbestos cases involved a series of multi-plaintiff "all issues" trials. The Supreme Court of Appeals then replaced Judge MacQueen with a "supervising judge," the Honorable Martin J. Gaughan, instructing him to develop a new trial plan—one which would "commenc[e] all trials no later than July 1, 2002." *See West Virginia ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 377 (W. Va. 2001). In response to that directive, Judge Gaughan developed the current plan—to begin with three "fault" trials and then proceed to consider other issues in sequence—albeit beginning with a September 2002 trial, not a July 2002 trial. On July 9, 2002, the Supreme Court of Appeals disqualified Judge Gaughan (due to his stock ownership in some of the defendant companies), replacing him with the Honorable Arthur M. Recht as supervising judge and appointing the Honorable Booker T. Stephens to assist Judge Recht and preside over a portion of the September 2002 mass trial.

distinct and fundamental errors by the West Virginia Supreme Court of Appeals:

First, the West Virginia Supreme Court of Appeals held that the mass trial it has prescribed is not subject to the traditional restrictions and limitations on aggregating multiple claims by and against multiple parties, as reflected in the usual rules of civil procedure (*e.g.*, Rules 20, 23 and 42), and as elaborated in part in *West Virginia ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609 (W. Va. 1993) (articulating requirements for Rule 42 consolidation). The court held that those limitations did not apply to a mass trial conducted under the auspices of the Supreme Court of Appeals and West Virginia Trial Court Rule 26.01. In so doing, the West Virginia Supreme Court of Appeals failed to recognize that the procedural rules which it felt free to disregard (and which are similar to the federal rules and rules applicable in every state) encapsulate the historic, minimum preconditions for aggregating cases consistent with basic federal due process requirements.

Second, the West Virginia Supreme Court of Appeals has repeatedly and explicitly conceived of its deadline for trial, and the resulting mass trial, as a means of relieving the burden imposed by these asbestos cases on the West Virginia courts—a means which is justified by a *state* constitutional imperative that "justice" be administered "without delay." *See, e.g., West Virginia ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 425 (W. Va. 2002) (citing W. Va. Const. art. III, § 17); *see also* Pet. App. at 24a, 29a (invoking the same constitutional provision to justify the mass trial plan). The court has envisioned its task as one that involves balancing the obligation to afford plaintiffs a prompt adjudication (notwithstanding the extraordinary number of claims) against the due process rights of defendants.[8] In so doing, the court

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[8] The West Virginia Supreme Court of Appeals' fundamental misunderstanding of its constitutional obligations arguably runs much deeper,

has fundamentally mistaken the constitutional task: a *legislature* might well have the power to create a compensation system or other statutory scheme that serves as a substitute for adjudication. But *courts* deal in adjudication only. As such, they are bound to assure that no person be deprived of property without due process of law. They are, therefore, without power to declare that a *state* constitutional commitment to speedy civil justice trumps the federal constitutional requirement that defendants be afforded due process. As a matter of federal supremacy, U.S. Const. art. VI, § 2, Premises Defendants' right to the minimum protection which due process requires must prevail over the state constitutional requirement.

A. The West Virginia Supreme Court Of Appeals Has Improperly Dispensed With The Application Of Procedural Rules That Afford Defendants Due Process Of Law In Connection With The Aggregation Of Cases.

1. In an adjudicatory setting, before liability may be imposed on a civil defendant, if facts are in dispute, due process requires a "meaningful" and fair opportunity to present arguments and evidence in support of one's defense. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). One might debate at the margins—and they may be

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for it has described the relevant balance as between "the right of the parties [*i.e.*, the plaintiffs] to have access to the judicial system in a reasonably prompt fashion" and the need to avoid "simultaneously grinding the court system to a halt." *Gaughan*, 563 S.E.2d at 424. Nowhere in that calculus does the court even acknowledge the existence of the rights of *defendants* to a more than token opportunity to defend against the torrent of asbestos claims. As this Court has noted, "process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

wide margins—precisely what is encompassed by a "meaningful" opportunity to defend. But certainly for the Founders, and later for the proponents of the Fourteenth Amendment, "due process of law" surely contemplated the basic sorts of protection associated with a trial, including the opportunity to present a direct and particularized response to individual claims.[9]

2. There is one noteworthy exception to the ordinary rule that a defendant is entitled to an opportunity to defend with particularity. That exception is the class action.[10] In class actions, we permit an issue to be determined against a particular defendant without affording the defendant the opportunity to offer a particularized defense to the claims of each plaintiff. We allow the determination made in the context of one or a small group of representative plaintiffs to apply *as to all plaintiffs*. But we take away that fundamental right to defend each case with particularity only after specific inquiries that assure the fairness of that approach. Those inquiries, embodied in Rule 23, focus on the suitability of the case for class treatment, including the selection of appropriate representative plaintiffs, explicit findings about the typicality of the claims of those plaintiffs, and the existence of

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[9] The Due Process Clause protects defendants as well as plaintiffs, and has long been viewed as "preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed rights.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (quoting *Boddie v. Connecticut*, 401 U.S. at 380).

[10] Collateral estoppel principles likewise limit the right to provide a particularized defense to an individual claim. But, as with class actions, collateral estoppel principles halt relitigation of an issue only where the issues in the original and subsequent case are identical and where the original finding was rendered in a proceeding, the quality of which warrants the use of findings from that proceeding in a subsequent case. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 331 (1979).

questions of law and fact common to all members of the class which predominate over individual issues. *E.g.*, Fed. R. Civ. P. 23. What renders the matter appropriate for such class treatment is that it turns on discrete and definable issues that properly allow findings as to one to apply as to all.

Class action requirements are often discussed in connection with the need to protect absent plaintiffs. But the basic class action inquiry also provides vital protection to the defendant. Issues subject to class determination must be sufficiently well-defined and common to all plaintiffs, and the defendant must be given a full and fair opportunity to defend on such issues, before we would consider allowing determinations with respect to one plaintiff to be generalized to a class – and the defendant deprived of its right to present a particularized defense to each plaintiff's claim.

3. Rules regarding consolidation and joinder (as reflected in Fed. R. Civ. P. 42 and 20 and their state counterparts, *e.g.*, W. Va. R. Civ. P. 42 and 20) rest on a somewhat different premise. Traditional consolidation under Rule 42 is *not* designed to deprive a defendant of its right to present a particularized defense to individual claims. With a consolidation, the right to present a defense to a specific claim may be fully preserved. Indeed, the objective is generally to preserve that right while achieving such efficiencies as are possible by combining more than one claim or case in a single trial. The same applies to joinders under Rule 20.

In allowing consolidation, the courts—applying established rules of procedure common to both state and federal courts—are obliged to provide scrupulous assurance that the proposed combination can be achieved without significant prejudice to the defendant.[11] Thus, requirements of commonality and

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[11] As noted, West Virginia's procedures regarding a court's determination of the appropriateness of a consolidation are set forth in the Supreme Court of Appeals' opinion in *Ranson*, 438 S.E.2d 609.

typicality perform a somewhat different, but no less important, function in consolidated cases than they do in connection with class actions. The court must be mindful of the difficulty that a lay jury will have in trying to make sense of a hodgepodge of difficult factual and legal theories involving variously-situated plaintiffs and defendants over an extended period of time. As the number of relevant criteria and considerations increases, the jurors' task grows exponentially.

Tested under traditional standards for consolidation, conscientious jurists have wrestled with the fairness of combining even a few "asbestos" cases involving long time periods, multiple theories of recovery, multiple sites, multiple products, multiple types of injuries, as well as multiple defendants and plaintiffs. *See, e.g., Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) (finding consolidation of 13 asbestos plaintiffs improper); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993) (finding consolidation of 48 asbestos claims improper); *In re Seventh Judicial District Asbestos Litigation*, 744 N.Y.S.2d 304 (N.Y. Sup. Ct. 2002) (denying consolidation of four separate asbestos actions due to prejudice to defendants).[12] Indeed, this Court has twice rejected attempts to treat the multitude of asbestos cases as a certifiable class, noting that aggregation of such cases is inappropriate where, as here, "individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 625; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

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[12] Courts have been similarly reluctant to permit aggregation of multiple tobacco cases. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 743 n.15 (5th Cir 1993) (denying class treatment for tobacco claims); *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 547, 550 (W.D. Wis. 1999) (granting severance due to dissimilarity of claims); *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516 (N.Y. App. Div. 2000) (reversing order for joint trial of multiple tobacco claims due to prejudicial effect).

4. As demonstrated in the Petition, the West Virginia Supreme Court of Appeals has to this point dispensed with all of the traditional protections associated with class actions, on the one hand, and consolidations, on the other. It has found the traditional inquiries inapplicable because the consolidation for a mass liability trial at issue here, directed by the West Virginia Supreme Court itself,[13] is neither a Rule 23 class action nor a Rule 42 consolidation, and thus does not fall within the purview of either rule. In other words, because the West Virginia aggregations have been conducted under the authority of a state procedural rule heretofore unknown to law—West Virginia Trial Court Rule 26.01—the traditional standards applied to class actions and consolidations, and embodied in those rules, do not apply. *See Allman*, 551 S.E.2d at 374 ("Because the provisions of [Trial Court Rule] 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting various rules of civil procedure, including Rules 20, 23, or 42"); *Gaughan*, 563 S.E.2d at 424 ("*Ranson* findings are not required in matters proceeding under [Trial Court Rule] 26.01"). That is a fundamental error because those rules exist in order to afford due process to civil litigants.

It is not sufficient that the court has stated generally that the mass trial should be fair and conducted in accordance with due process. A court must bear in mind the requisites of due process before it embarks upon, and as it establishes procedures for, a "mass trial." They have not been considered here.

States are presumably *not* without power to develop procedures that are neither class actions nor consolidations—perhaps admixtures of both. But the creation of procedural hybrids—if that is what this mass trial is to be—is not a

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[13] *See Allman*, 551 S.E.2d at 377 (ordering the newly appointed supervising judge to set a trial plan that provides for the "commence[ment] of all trials no later than July 1, 2002").

license to dispense with protections afforded defendants under traditional procedural forms. The courts must remain focused on the basic protections due a defendant in a civil action.

The order of the West Virginia Supreme Court of Appeals requiring that these cases be commenced on a date certain (without providing the resources to allow these cases to be adjudicated in a manner consistent with traditional standards) is thus fundamentally unsound and improper. A court directive that in excess of eight thousand cases be taken to trial on a fixed date is permissible *only* if that can be done consistent with the basic requirements of due process. The West Virginia Supreme Court of Appeals' directive in setting a trial date and imposing it on the lower court has fundamentally misconceived the constitutional priorities. The result of the appeals court setting and approving a trial date for *all* asbestos cases, without first considering whether the date can and will be met in a manner consistent with the requirements of due process, is no less arbitrary than the administrative error that deprived a plaintiff of a right to have its claim heard in *Logan*. *See* 455 U.S. at 437 (holding that Illinois Fair Employment Practices Commission's failure to schedule fact finding conference within statutory period could not, consistent with due process, justify extinguishing the plaintiff's discrimination claim).

5. The cases set for mass trial are not being treated as class actions because no one would argue that they could possibly qualify for class action treatment. *See generally Amchem*, 521 U.S. at 624. Similarly, these cases were not consolidated under Rule 42 because no one would suggest that they could meet the standards associated with that rule. A trial involving the claims of more than 8,000 plaintiffs against hundreds of defendants provides no meaningful opportunity to mount a defense to individual claims. Prejudice and confusion is inherent in combining thousands of cases involving complex

and different legal theories, defendants with varying knowledge of the dangers of asbestos, who took varying steps to guard against risk over time, whose premises (and locations within those premises) involved very different degrees of risk, and where the degrees of risk relate very much to the particular circumstances (and frequency of visits to the premises) by any particular plaintiff. The West Virginia Supreme Court of Appeals exempted the mass trial that it initiated from the traditional standards governing consolidation because the mass trial could never satisfy those standards.

On its face, the mass trial "so departs from [the] accepted norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). In light of that presumptive violation, it was incumbent on the West Virginia court to, at a minimum, address the due process issues and establish some method of assuring defendants that their due process interests would be protected. The West Virginia Supreme Court of Appeals has not done so.[14]

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[14] The West Virginia Supreme Court of Appeals' suggestion that it conducted an adequate inquiry into the existence of common questions of law and fact sufficient to justify the aggregation of these thousands of disparate claims for trial when it initially transferred the cases to the MLP under Trial Court Rule 26.01 back in November 2000, *see Gaughan*, 563 S.E.2d at 425, is mistaken. The record of that proceeding demonstrates that the appropriateness of consolidating the asbestos cases for purposes of a *mass liability trial* was not considered, much less established. That issue was referred to the MLP. Further, while Trial Court Rule 26.01 authorizes the aggregation of "personal injury mass tort" cases before the MLP, it does not prescribe a mass liability trial of referred cases. In fact, the Rule is silent as to the particular case management and trial plans which are to be implemented, leaving such plans to the MLP for development. *See* W. Va. Trial Ct. Rule 26.01(b)(1).

B. The West Virginia Supreme Court of Appeals Has Improperly Elevated A State Constitutional Right To Swift Justice Over The Due Process Protections Guaranteed A Civil Defendant.

1. The West Virginia Supreme Court of Appeals has sought to justify the mass trial as part of a balancing of interests in light of a state constitutional right to swift justice. Thus, in fixing a date for trial, the Supreme Court of Appeals has repeatedly referenced the state constitutional command that "justice shall be administered [by the courts] without sale, denial or delay." W. Va. Const. art. III, § 17. *E.g.*, *Gaughan*, 563 S.E.2d at 425. Following its lead, the trial court similarly relied on W. Va. Const. art III, § 17 as justification for the mass trial. *See* Pet. App. at 24a, 29a. Yet neither that provision of the state constitution nor the burden that these suits impose on the state courts, can override the federal directive that no state may deprive a defendant of property without due process of law. The Supremacy Clause makes the proper "balance" clear.

As frequently observed by this Court, the crisis in the courts created by proliferation of asbestos lawsuits might justify any number of *legislative* solutions, perhaps in the form of a compensation program to substitute for traditional adjudication. *See Amchem*, 521 U.S. at 628-29. Legislatures possess the power to originate programs that balance the ultimate interests of assertedly injured persons and those responsible for those injuries in a manner that protects each side's legitimate interests, consistent with "legislative" due process. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) (noting the power of Congress to create a uniform standard of liability for manufacturers of defective products but decertifying class in mass tort context).

Courts, however, ordinarily lack the power to provide such "legislative" solutions. They must work within the traditional

framework of adjudication. They cannot decree a "compensation program" as a substitute for adjudication. Courts can only provide the assurance that adjudications under their auspices conform to basic standards of due process. The burdens imposed by the ever-burgeoning West Virginia asbestos docket on the courts of that State—while crying out for a legislative solution—do not provide a basis for disregarding minimum due process standards in the context of traditional adjudication. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 443 (5th Cir. 2001) ("we refuse[] to tolerate deviation from fundamental principles of due process simply because asbestos cases threatened to swamp the resources of the federal courts"). The state constitutional right to justice without delay, repeatedly invoked by the West Virginia Supreme Court of Appeals, cannot outweigh or override the requirements of due process that protect a civil defendant as a matter of federal constitutional right.[15] If such a right to speedy justice is afforded by state law, then the State must provide the *resources* to provide that speedy disposition consistent with due process. The West Virginia judiciary cannot overcome a limitation in its own judicial resources by prescribing a mass disposition of cases that runs roughshod over defendants' federally guaranteed due process rights.[16]

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[15] As this Court has noted, each of the Court's "due process cases has recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures . . . .'" *Logan*, 455 U.S. at 432 (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

[16] *See In re Federal-Mogul Global, Inc.*, No. 02-1426, 2002 WL 1763923, at *38 (3d Cir. July 31, 2002) (observing that the need to solve the asbestos crisis within the courts cannot justify an end run around the law).

II. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI AT THIS TIME BECAUSE THE ISSUES ARE RIPE FOR REVIEW AND BECAUSE ANY DELAY WOULD EFFECTIVELY INSULATE THE WEST VIRGINIA SUPREME COURT OF APPEALS' ACTIONS FROM REVIEW

The Petition raises important questions warranting issuance of a writ of certiorari. Premises Defendants recognize, however, that this Court must consider whether this is an appropriate time for this Court's intervention, before the "mass trial" has begun. It is. There are at least four reasons that, taken in combination, demonstrate that this Court should intervene now, rather than stay its hand until the "mass trial" has run its course.

1. The issues presented—which address fundamental mistakes in the direction chosen by the West Virginia Supreme Court of Appeals—are ripe and appropriate for review.

a. In finding that the state constitutional imperative of speedy justice is to be weighed by the judiciary against the minimum requirements of adjudicative due process, the West Virginia Supreme Court of Appeals has gone down the wrong path. The issue whether such balancing is acceptable at the expense of minimum federal constitutional standards is fully ripe for consideration.

b. The question whether traditional standards limiting consolidation for trial have a due process component that must be considered in setting up a "mass trial" is likewise ripe for review. In this regard, the statement of the West Virginia Supreme Court of Appeals that it could not consider due process objections until the trial court specified the "common issues," *Gaughan*, 563 S.E.2d at 426, does not warrant this Court's postponement of review. First, the court's suggestion to the contrary notwithstanding, at the time

it issued its decision, the West Virginia Supreme Court of Appeals had before it a clear statement of the "common issues" to be tried in the September mass trial.[17] Second, and more important, the failure of due process at issue here is *not* dependent on any particular formulation of the so-called "common issues." In no uncertain terms, the West Virginia Supreme Court of Appeals has imposed a deadline for resolution of the asbestos cases that requires a mass trial. That mass trial will consist of three trials of three broad categories of claims on the issue of each defendant's "fault." Such a mass trial on "fault" necessarily combines the claims against dozens of defendants, involving numerous sites, locations within sites, types of use on the premises, exposure levels, time periods, and mitigation efforts, all of which bear on both the existence of any duty to any particular plaintiff and whether the defendant acquitted that duty. It is that mass combination of facts and issues that renders the mass trial concept promoted by the West Virginia Supreme Court of Appeals flatly incompatible with due process of law.

2. The Court's intervention also is appropriate at this time because for many, and perhaps most, defendants it is now or never. The pressure on certain defendants to settle can be overwhelming. Indeed, that may be the very purpose of setting the mass trial. One can hardly conceive of a more effective means of forcing defendants to settle than this mass trial. For some defendants, a negative judgment from such a mass trial can have substantial balance sheet consequences, which consequences are not lessened by the hope that this Court will grant certiorari and vacate the judgment.

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[17] The February 26th trial scheduling order entered by Judge Gaughan, which was the basis for Mobil's petition for a writ of mandamus and/or prohibition to the West Virginia Supreme Court of Appeals, clearly identified the purportedly "common issues" which would be the focus of the mass trial. *See* Pet. App. at 26a-27a. More recently, the MLP (on August 12) stated that it was dissatisfied with any existing statement of the common issues for the premises liability claims.

Even if this Court ultimately vindicates the rights of defendants that stick it out to the end, that will be of no solace to those defendants forced to settle. Moreover, the number of settlements may itself significantly change the nature and scope of the trial. (For example, imagine if the pressure to settle resulted in a trial against only a single defendant.) Thus, the basic issues now presented may evade review—but the harm to the defendants will nevertheless have been done.

3. In some cases, this Court might wish to stay its hand in order to give the state judicial system a full opportunity to consider an issue both before, and then after, trial. Here, however, the West Virginia Supreme Court of Appeals has a direct and unique role in promoting this mass trial. It was the direction of the West Virginia Supreme Court of Appeals that set this mass trial in motion when it ordered Judge Gaughan, as supervising judge of the MLP asbestos cases, to commence trial of all MLP asbestos cases by July 2002.[18] *See Allman*, 551 S.E.2d at 377. And, having originated the idea, the Supreme Court of Appeals has shown no inclination whatsoever to waver from it. *See Gaughan*, 563 S.E.2d at 426-27. The West Virginia Supreme Court of Appeals has thus been given repeated opportunities to address the fundamental questions presented by this Petition, and has chosen in each instance to stay the course.

4. Finally, the very nature of the asbestos problem being addressed by the West Virginia courts militates in favor of consideration now rather than later. As so many have observed, while some of the plaintiffs suffer from serious asbestos-related diseases, the cases clogging the dockets are disproportionately populated by unimpaired plaintiffs, complaining of asymptomatic pleural thickening. It is those claims which crowd the docket.

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[18] Judge Gaughan subsequently scheduled the mass trial for September 23, 2002, with the Supreme Court of Appeals' approval. *See Gaughan*, 563 S.E.2d at 426.

It is assuredly not in the interest of the truly ill to travel the long road of a mass trial (justified by the need to dispose of thousands of claims by plaintiffs who are asymptomatic), followed by various appeals, before reviewing the constitutionality of what the West Virginia court has authorized at the risk of being forced to begin again when that judgment is reversed. Indeed, without a mass trial to muddy the docket, the state courts would be free to direct plaintiffs' counsel to disclose who the seriously ill plaintiffs are and proceed to settlement or trial on the claims of the seriously ill sooner rather than later.

CONCLUSION

For all the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

MOBIL CORPORATION AND
HONEYWELL INTERNATIONAL INC.,

Petitioners,

v.

BRUCE W. ADKINS, *et al.*

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MEMORANDUM OF DAIMLERCHRYSLER CORPORATION, FORD MOTOR COMPANY, AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITION FOR CERTIORARI

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August 19, 2002

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, nominal respondents hereby state as follows:

DaimlerChrysler Corporation is wholly owned by DaimlerChrysler North America Holding Corporation, which in turn is wholly owned by DaimlerChrysler AG.

Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

General Motors Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT

THE WEST VIRGINIA SUPREME COURT OF APPEALS ERRED BY ALLOWING MASS AGGREGATION OF CLAIMS WITHOUT ANY INDIVIDUALIZED INQUIRY INTO PREJUDICE 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 1, 2

Arnold v. Eastern Air Lines, Inc.,
712 F.2d 899 (4th Cir. 1983) (*en banc*) 7

Bruton v. United States,
391 U.S. 123 (1968) 6

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993) 4

Hendrix v. Raybestos-Manhattan, Inc.,
776 F.2d 1492 (11th Cir. 1985) 7

In re Asbestos Litig.,
271 B.R. 118 (S.D.W.Va. 2001) 5

In re Brooklyn Navy Yard Asbestos Litig.,
971 F.2d 831 (2d Cir. 1992) 7

In re Federal-Mogul Global, Inc.,
___ F.3d ___, 2002 (3d Cir. July 31, 2002) 5

Johnson v. Celotex Corp.,
899 F.2d 1281 (2d Cir. 1990) 6, 7

Kotteakos v. United States,
328 U.S. 750 (1946) 6

Krulewitch v. United States,
336 U.S. 440 (1949) 6

Malcolm v. National Gypsum Co.,
995 F.2d 346 (2d Cir. 1993) 7

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 2, 10

Richardson v. Marsh,
481 U.S. 200 (1987) 7

State ex rel. Appalachian Power Co. v. Ranson,
438 S.E.2d 609 (W. Va. 1993) 5

STATUTES, REGULATIONS, AND RULES

28 U.S.C. § 1334(b) 4

28 U.S.C. § 1452(b) 4

28 U.S.C. § 157(b) 5

48 Fed. Reg. 51086 (1983) 9

Fed. R. Civ. P. 42 6

S. Ct. R. 12.6. 1

MISCELLANEOUS

Cha, P. & Carter, P.,
Simulation of Automobile Brake Wear Dynamics and Estimation of Emissions,
SAE Technical Paper #831036 (1983) 8

Gross, P.,
Is Short-Fibered Asbestos Dust a Biological Hazard?, 29
Arch. Environ. Health 115 (1974) 9

Gross, P. & Braun, D.,
Toxic and Biomedical Effects of Fibers: Asbestos, Talc, Inorganic Fibers, Man-Made Vitreous Fibers, and Organic Fibers (1984) 8

Hatch, D.,
Possible Alternatives to Asbestos as a Friction Material,
13 Ann. Occup. Hyg. 25 (1970) 8

Jacko, M. & DuCharme, R.,
Brake Emissions: Emissions Measurements From Brake & Clutch Linings from Selected Mobil Sources,
Rept. APTD-1557 (EPA 1973) 9

Johnson *et al.*,
Industrial Hygiene Assessment of Seven Brake Servicing Facilities (NIOSH 1979) 8

Lynch, J.,
Brake Lining Decomposition Products,
18 Air Pollution Control Assoc. 824 (1968) 8

Parkes, W.,
Occupational Lung Disorders (2d ed. 1982) 8, 9

Parloff, R.,
The $200 Billion Miscarriage Of Justice,
Fortune, March 4, 2002, at 162 . . . . . 3, 4

Rand Institute,
Asbestos Litigation in the U.S.: A New Look at an Old Issue (Aug. 2001) 3

Roberts, D. & Zumwalde, R.,
Industrial Hygiene Summary Report of Asbestos Exposure Assessment for Brake Mechanics,
Rept. #32.4 (NIOSH 1982) 8

Roggli, V., *et al.*,
Analysis of Tissue Mineral Fiber Content,
in Pathology of Asbestos-Associated Diseases (1992) . . . 9

Rowson, D.,
The Chrysotile Content of the Wear Debris of Brake Linings,
47 Wear 315 (1978) 8

Schmitt, R.,
Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial,
Wall St. J., Mar. 5, 2001 3

Sheehy *et al.*,
Control of Asbestos Exposure During Brake Drum Service,
4 Applied Ind. Hyg. 313 (1989) 8

Williams, R. & Muhlbaier, J.,
Asbestos Brake Emissions,
29 Env. Res. 70 (1982) 8

Wong, O.,
Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence,
34 Reg. Toxic & Pharm. 170 (2001) 8

MEMORANDUM OF DAIMLERCHRYSLER CORPORATION, FORD MOTOR COMPANY, AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITION FOR CERTIORARI

Nominal respondents DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation, which were parties to the proceeding below, now file this memorandum in support of the petition pursuant to this Court's Rule 12.6.

INTRODUCTION

It may seem odd to find that the Nation's three largest automobile manufacturers—DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation—are defendants in thousands of asbestos lawsuits recently filed in the courts of virtually every State of the Union. It turns out, however, that for a number of years in the 1960s and 70s, the automakers used brake pads and other friction products containing encapsulated asbestos in their vehicles. Although epidemiological studies have unanimously rejected the notion that exposure to automotive friction products can cause disease, asbestos plaintiffs have nonetheless swept the automakers into their vast net of potential liability along with hundreds of other companies that incorporated products containing asbestos into their own products. Indeed, the standard asbestos complaint now names no fewer than 111 defendants, including the automakers, along with hundreds of additional "John Does." Under any system of justice worthy of the name, plaintiffs cannot remotely attribute their alleged injuries—and the word "injury" is used loosely in a world where most current asbestos plaintiffs manifest "little or no physical impairment," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (internal quotation omitted)—to any act or omission by the automakers.

This case shows why plaintiffs do not care. The Supreme Court of Appeals of West Virginia has ordered thousands of individual asbestos claims—no one knows how many for sure—to be litigated in a single "trial" against hundreds of defendants *without conducting any inquiry whatsoever into the potential prejudice to any defendant*. In this "mass trial" setting, individual claims and defenses are irrelevant: the jury will simply be asked to use formulas and statistics to allocate liability among the defendants. The more defendants that are sucked into this litigation "black hole," the better from plaintiffs' point of view. As a practical matter, defendants are under hydraulic pressure to settle before participating in any such "trial," especially since the jury will be asked to determine not only defendants' "fault" but also a punitive damages "multiplier" before even considering any issues of causation or compensatory damages.

This Court should not allow this travesty to proceed. The "mass trial" procedure approved by the West Virginia Supreme Court of Appeals bears no resemblance to the traditional judicial model. Just as this Court held in *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), that the asbestos litigation crisis could not be allowed to distort the Federal Rules of Civil Procedure, it is now time to remind state courts that the crisis cannot be allowed to distort constitutional principles of due process either. Accordingly, the automakers respectfully urge this Court to grant the petition and reverse the judgment below.

STATEMENT OF THE CASE

The background of this particular case is discussed at greater length in the petition, and the automakers hereby adopt that discussion. To appreciate the gravity of the constitutional issues presented, it is imperative to appreciate the gravity of the national asbestos crisis. Far from abating in recent years, that crisis has moved to an entirely new level. As the major asbestos manufacturers have gone bankrupt, and as the bankruptcy trusts have begun to dwindle, claims are

increasingly being brought against companies that never manufactured asbestos, but only used asbestos-containing materials in their products or operations. "[A]s one defendant has followed another into chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants." Rand Institute, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 25 (Aug. 2001). Indeed, it is estimated that "[n]ontraditional defendants now account for over 60% of asbestos expenditures," *id.* at 10, and current asbestos litigation has been characterized as "The Search for the Solvent Bystander," Roger Parloff, *The $200 Billion Miscarriage Of Justice,* Fortune, March 4, 2002, at 162.

Thus, although the incidence of asbestos-related disease has declined markedly over the three decades since the government enacted strict regulations governing asbestos use in 1971, *see* National Cancer Institute, *SEER Data*, available at www-seer.ims.nci.nih.gov, there has been a dramatic upsurge of asbestos claims filed in recent years, *see* Rand Institute, *Asbestos Litigation,* at 6, 13; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001 ("A generation ago, some experts predicted that asbestos suits would be tailing off by now. But the pace is only picking up.").[1] Many of the plaintiffs filing these new claims have neither "incurred any medical expenses [nor] ever lost a day of work due to asbestos exposure." Parloff, *$200 Billion*

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[1] "It has been 20 to 30 years since most asbestos-containing products were phased out of production completely. As a result, instances of serious asbestosis began declining many years ago. The 1994 edition of the medical text Occupational Lung Disorders describes asbestosis as a 'disappearing disease.' But while asbestosis may be disappearing from America's hospitals, it is precipitously on the rise in America's courthouses, with the rate of new filings against some defendants having nearly tripled in the past two years." Parloff, *$200 Billion Miscarriage,* at 156.

Miscarriage, at 155. The impact on the American economy, however, has been substantial: in the past two years alone, at least ten major companies (Babcock & Wilcox, Pittsburgh Corning, Owens Corning, Burns & Roe, Armstrong World Industries, G-I Holdings, W.R. Grace, USG, U.S. Mineral, and Federal-Mogul Global, Inc.) have been forced to seek bankruptcy protection because of asbestos claims. As *Fortune* magazine recently reported, "[t]otal corporate asbestos liability to U.S. plaintiffs is now expected to reach $200 billion," and "though as recently as 15 years ago dispassionate experts predicted that a total of 100,000 people might eventually file asbestos-related claims, the most recent forecasts predict between 1.3 million and 3.1 million claims, of which only about 570,000 have yet been filed." *Id.* at 155-56.

The automakers, like petitioners Mobil and Honeywell, were never in the business of manufacturing or selling asbestos, but instead are "Main Street" American companies that merely incorporated friction products containing encapsulated asbestos (such as brake pads) into their own products. The automakers purchased such automotive friction products from Federal-Mogul Global, Inc., an automotive-parts supplier that was forced into bankruptcy late last year after being swamped with over 70,000 asbestos friction-product claims.

Based on the Federal-Mogul bankruptcy, the automakers removed thousands of asbestos claims against them from state to federal court under 28 U.S.C. § 1452(b) as "related to" the Federal-Mogul bankruptcy within the meaning of 28 U.S.C. § 1334(b). The purpose of such removal, the automakers explained, was for the federal bankruptcy court for the District of Delaware, where the underlying Federal-Mogul bankruptcy was pending, to conduct a global hearing under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to determine whether plaintiffs' "evidence" of causation in automotive friction-product cases was admissible, and hence whether plaintiffs' claims could survive summary judgment. Although

the Delaware court provisionally transferred all removed friction-product claims against the automakers to itself under 28 U.S.C. § 157(b), it ultimately concluded that it lacked bankruptcy jurisdiction over those thousands of claims, and the Third Circuit dismissed the automakers' appeal from that order for lack of appellate jurisdiction. *In re Federal-Mogul Global, Inc.*, ___ F.3d ___, 2002 WL 1763923 (3d Cir. July 31, 2002).

The claims removed by the automakers from the West Virginia state courts, however, never even made it into the *Federal-Mogul* proceeding. Almost immediately after removal, and before the Delaware court had entered the provisional transfer order, Chief Judge Haden of the Southern District of West Virginia remanded all the West Virginia claims to state court. *In re Asbestos Litig.*, 271 B.R. 118 (S.D.W.Va. 2001). Accordingly, the claims against the automakers proceeded in the West Virginia state courts, and the automakers joined petitioners' unsuccessful petition for relief in the West Virginia Supreme Court of Appeals. Absent intervention by this Court, the automakers will be part of the "mass trial" in West Virginia state court scheduled to begin on September 23, 2002.

REASON FOR GRANTING THE WRIT

THE WEST VIRGINIA SUPREME COURT OF APPEALS ERRED BY ALLOWING MASS AGGREGATION OF CLAIMS WITHOUT ANY INDIVIDUALIZED INQUIRY INTO PREJUDICE.

The West Virginia Supreme Court of Appeals specifically rejected petitioners' claim that mass aggregation of claims without any individualized inquiry into prejudice violates federal due process. Pet. App. 9a-14a. According to the West Virginia court, such inquiry—known in that State as a *Ranson* inquiry, after *State ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609 (W. Va. 1993)—is inappropriate in cases (like this one) that have been placed in the new "mass litigation" program "based upon common factual and/or legal issues." Pet. App. 13a; *see also id.* ("[T]he adoption of [the mass

litigation rule] has effectively superceded the requirement that the *Ranson* factors be used in all mass trial cases . . . . Because this Court has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance.").

The West Virginia court's refusal to authorize any inquiry into prejudice resulting from this unprecedented mass aggregation of thousands of plaintiffs and hundreds of defendants is manifestly incorrect. The only commonality of these claims is that they allegedly involve injury caused by asbestos. The mere existence of a "common factual and/or legal issue" without more, however, is not enough to justify aggregation of claims for trial. To the contrary, it is elementary that due process prevents a joint trial—even in cases involving "common legal and/or factual elements"—where such joinder would be unduly prejudicial to a defendant. This issue often arises in the criminal context, where this Court has emphasized that the Federal Constitution limits judicial discretion to conduct a single trial of multiple defendants. *See, e.g., Bruton v. United States*, 391 U.S. 123, 131 (1968); *Kotteakos v. United States*, 328 U.S. 750, 774-75 (1946). That principle makes sense: it would be fundamentally unfair, for instance, to try someone whose alleged involvement in wrongdoing was only tangential along with the alleged kingpin. *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) ("It is difficult for the individual [defendant] to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.").

That principle applies with no less force in civil cases. Indeed, that is why Rule 42 of the Federal Rules of Civil Procedure has been construed to allow consolidation of cases in federal court only *after* assessing "'the specific risks of prejudice and possible confusion,'" and weighing those risks against the countervailing burdens of multiple litigation. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)

(quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)). As the Second Circuit has explained, "consolidation should not be ordered if it would prejudice defendant." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (internal quotation omitted); *see also id.* at 355 (Walker, J., dissenting) ("I agree that trial courts should not employ consolidated trials where they pose substantial risks of prejudice."). Even where consolidation would promote judicial efficiency, as the *Malcolm* court emphasized in reversing a judgment of 48 consolidated asbestos claims, "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Id.* at 350; *see also In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("The systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation."); *Johnson*, 899 F.2d at 1285 ("Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial."); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (*en banc*) ("[A] trial must remain fair to both parties, and . . . considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."); *cf. Richardson v. Marsh*, 481 U.S. 200, 217 (1987) ("On the scales of justice, . . . considerations of fairness normally outweigh administrative concerns.") (Stevens, J., dissenting).

Reasonable jurists can certainly disagree on whether a particular consolidated proceeding will unduly prejudice particular defendants. *Compare Malcolm*, 995 F.2d at 350 *with id.* at 355 (Walker, J., dissenting). But there is *no* room for disagreement on the fundamental principle that unfettered aggregation of claims, without *any* inquiry whatsoever into prejudice, is inconsistent with fundamental fairness.

And the due process issue is presented in this case in about as stark terms as can be imagined, given the outlandish nature

of plaintiffs' claims against the automakers, and the contrast between those claims and the claims against "traditional" asbestos defendants. Every epidemiological study to have examined the issue has rejected the notion that exposure to automotive friction products (even by those persons, like automobile mechanics, exposed on a regular basis), more likely than not causes disease. *See, e.g.*, O. Wong, *Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence*, 34 Reg. Toxic & Pharm. 170, 173-74 (2001) (describing studies). That is not surprising, because the encapsulated asbestos in brakes is thermally transformed during the braking process, so that only trace amounts of asbestos are emitted. *See, e.g.*, Wong, *Malignant Mesothelioma*, 34 Reg. Toxic & Pharm. at 174; J. Lynch, *Brake Lining Decomposition Products*, 18 Air Pollution Control Assoc. 824, 824, 826 (1968).[2] Moreover, of the small amounts of asbestos found in brake dust, approximately 80-90% of those fibers are below or far below five microns in length.[3] Fibers of that length are not associated with disease. Indeed, OSHA does not even regulate fiber emissions where the fibers are below five microns because researchers agree that

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[2] *See also* M. Jacko & R. DuCharme, *Brake Emissions: Emissions Measurements From Brake & Clutch Linings from Selected Mobil Sources*, Rept. APTD-1557, at 9-24 (EPA 1973); R. Williams & J. Muhlbaier, *Asbestos Brake Emissions*, 29 Env. Res. 70, 80 (1982); P. Cha & P. Carter, *Simulation of Automobile Brake Wear Dynamics and Estimation of Emissions*, SAE Technical Paper #831036, at 19 (1983); D. Hatch, *Possible Alternatives to Asbestos as a Friction Material*, 13 Ann. Occup. Hyg. 25, 27 (1970); D. Rowson, *The Chrysotile Content of the Wear Debris of Brake Linings*, 47 Wear 315, 315 (1978); W. Parkes, *Occupational Lung Disorders* 235 (2d ed. 1982).

[3] *See, e.g.*, D. Roberts & R. Zumwalde, *Industrial Hygiene Summary Report of Asbestos Exposure Assessment for Brake Mechanics*, Rept. #32.4, at 17 (NIOSH 1982); Sheehy *et al.*, *Control of Asbestos Exposure During Brake Drum Service*, 4 Applied Ind. Hyg. 313, 317 (1989); Hatch, *Possible Alternatives*, 13 Ann. Occup. Hyg. at 28; Johnson *et al.*, *Industrial Hygiene Assessment of Seven Brake Servicing Facilities* 10 (NIOSH 1979); Rowson, *Chrysotile Content*, 47 Wear at 317.

such small fibers are of "very low fibrogenic and carcinogenic potential."[4]

Notwithstanding the unique and novel nature of the friction product claims, the West Virginia Supreme Court of Appeals has now authorized a *single* jury in a *single* trial to determine the "fault" of the automakers alongside hundreds of other defendants with *no inquiry whatsoever* into the resulting prejudice. The West Virginia court's only justification for that ruling is the very one rejected by the federal authorities quoted above: administrative convenience. *See* Pet. App. 12a (asserting that consolidated proceeding "represent[s] the judicial system's best efforts to address the unique challenges of managing this voluminous litigation."). While one may sympathize with the "managerial nightmare of dealing with, or being inundated by, an inestimable and seemingly endless number of asbestos cases," *id.* (internal quotation omitted), that concern provides no excuse for depriving the automakers—and other defendants like petitioners—of their due-process right to a fair trial. Indeed, the West Virginia court's authorization of the mass trial at issue here will only exacerbate, not ameliorate,

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[4] *See, e.g.*, V. Roggli *et al.*, *Analysis of Tissue Mineral Fiber Content*, *in* Pathology of Asbestos-Associated Diseases 299, 333 (1992) (The "low risk of asbestos-related diseases among brake repair workers . . . [is] apparently related to the nature of brake dust. . . . Experimental animal studies have confirmed the very low fibrogenic and carcinogenic potential of short asbestos fibers."); P. Gross & D. Braun, *Toxic and Biomedical Effects of Fibers: Asbestos, Talc, Inorganic Fibers, Man-Made Vitreous Fibers, and Organic Fibers* 44 (1984) ("[T]here is both experimental and epidemiologic evidence as well as the evidence provided by autopsy findings that short asbestos fibers are not pathogenic."); P. Gross, *Is Short-Fibered Asbestos Dust a Biological Hazard?*, 29 Arch. Environ. Health 115, 116 (1974) ("[R]eports from different laboratories are unanimous in finding asbestos that has an average length < 5 microns is devoid of pathogenic potential. This included not only the fibrogenic potential but also the cancerogenic potential."); Parkes, *Lung Disorders*, at 72-74 ("[S]hort fibres (less than about 10 microns) . . . have little or no fibrogenic or oncogenic potential."); *see also* 48 Fed. Reg. 51086, 51111 (Nov. 4, 1983) ("Evidence for risk from fibers less than 5 micrometers in length is inconclusive.").

the "managerial nightmare" that concerned the lower court, as these fundamentally unfair procedures will render West Virginia a national asbestos-litigation magnet.[5]

The bottom line here is that it makes no sense to have a legal regime wherein aggregation of asbestos claims is strictly prohibited in federal court in light of the constitutional concerns underlying the Federal Rules of Civil Procedure, *see, e.g.*, *Ortiz*, 527 U.S. at 845-48, but state courts are wholly unconstrained to aggregate asbestos claims at will. This Court should remind the West Virginia Supreme Court of Appeals, and all other state courts confronted with burgeoning numbers of asbestos claims, that federal due process constrains their ability to strip asbestos defendants of traditional procedural protections in an attempt to address the sheer volume of asbestos claims. Indeed, in light of the ever-burgeoning numbers of such claims now inundating the Nation's courts, it is difficult to conceive of any other issue now confronting the American judicial system that more urgently requires this Court's review.

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[5] These concerns are only exacerbated by the West Virginia Supreme Court of Appeals' refusal to address petitioners' choice-of-law argument, and thereby to allow the trial court to apply West Virginia substantive law to claims that have no connection to that State. *See* Pet. App. 21a-23a (Maynard, J., concurring). The automakers support petitioners' position on the choice-of-law issues raised in the second question presented.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL, INC.,
Petitioners,
v.
BRUCE W. ADKINS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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CORPORATE DISCLOSURE STATEMENTS

Respondent A.W. Chesterton Company is a closely held corporation owned by various members of the Chesterton family and no publicly held corporation owns 10% or more of its stock.

Respondent A&I Company ("A&I") had no parent corporations and no publicly held companies owned 10% or more of A&I stock. A&I filed papers of dissolution on November 5, 1999.

Respondent A-Best Products Company, Inc. states that no publicly held company owns 10% or more of its stock.

Respondent Argo Packing Company states that no publicly held company owns 10% or more of its stock.

Respondent Asarco Inc. states that no publicly held company owns 10% or more of its stock.

Respondent Atlas Industries, Inc. ("Atlas") has no parent corporations, and no publicly held companies own 10% or more of Atlas' stock.

Respondent Beazer East, Inc., a Delaware company, is wholly owned by Hanson Holdings Basalt, Inc., which is also a Delaware company. Hanson Holdings Basalt, Inc. is wholly owned by Hanson Holdings Aragonite, Inc., which is also a Delaware company. Hanson Holdings Aragonite, Inc. is wholly owned by Hanson Building Materials America, Inc., which is also a Delaware company. Hanson Building Materials America, Inc. is wholly owned by Hanson, plc, which is a publicly traded London company.

Respondent CertainTeed Corporation is an indirect, wholly-owned subsidiary of Compagnie de Saint-Gobain, Paris, France. CertainTeed has no other parent company that is publicly held. No other publicly-held company owns stock in Certain-Teed Corporation, and no publicly-held company owns more than 10% of the stock of Compagnie de Saint-Gobain.

Respondent Combustion Engineering, Inc. is a wholly owned subsidiary of Asea Brown Boveri, Inc., which is not a publicly held corporation. ABB Ltd is a Swiss corporation which is a publicly held corporation and it is the ultimate parent corporation of Combustion Engineering, Inc. and Asea Brown Boveri, Inc.

Respondent Ericsson, Inc's parent company is a Swedish Corporation, Telefonaktiebolaget L M Ericsson. Telefonaktiebolaget L M Ericsson has two companies who own more than 10% of the voting rights, Investor AB and AB Industrivärden.

Respondent Fairmont Supply Company states that 100% of its stock is owned by CONSOL Energy, Inc.

Respondent Famous Supply Company states that no publicly held corporation owns 10% or more of its stock.

Respondent Flowserve Corporation (formerly known as Durametallic Corporation) states that no publicly held corporation owns 10% or more of its stock.

Respondent Foster Wheeler L.L.C., survivor to a merger with Foster Wheeler Corporation, is the wholly owned subsidiary of Foster Wheeler Ltd. Foster Wheeler Ltd. has no parent corporations, and no known publicly held company owns 10%

or more of Foster Wheeler Ltd. stock.

Respondent Foster Wheeler Energy Corporation is the wholly owned subsidiary of Foster Wheeler Power Group, Inc. Foster Wheeler Power Group, Inc. is the wholly owned subsidiary of Foster Wheeler Inc. Foster Wheeler Inc. is the wholly owned subsidiary of Foster Wheeler L.L.C. The parent of Foster Wheeler L.L.C., survivor to a merger with Foster Wheeler Corporation, is Foster Wheeler Ltd. Foster Wheeler Ltd. has no parent corporations, and no known publicly held company owns 10% or more of Foster Wheeler Ltd. stock.

Respondent Geo. P. Rientjes, Inc. states that no publicly held company owns 10% or more of its stock.

Respondent George V. Hamilton, Inc. states that no publicly held company owns 10% or more of its stock.

Respondent Georgia-Pacific Corporation states that no publicly held company owns 10% or more of its stock.

Respondent Greene, Tweed & Co., Inc. ("Greene, Tweed") is wholly owned by Greene, Tweed of Delaware, Inc. Greene, Tweed of Delaware, Inc. has no parent corporations, and no publicly held companies own 10% or more of Greene, Tweed of Delaware's stock.

Respondent Hobart Brothers Company, an Ohio corporation, is a wholly owned subsidiary of Illinois Tool Works Inc., a publicly traded company. No publicly traded company owns 10% or more of the stock of Illinois Tool Works Inc.

Respondent Insul Company, Inc. ("Insul") has no parent corporations, and no publicly held companyies own 10% or

more of Insul's stock.

Respondent Joy Technologies, Inc. states that 100% of its stock is owned by Joy Global, Inc.

Respondent Lac d'Amiante du Quebec, Ltee states that no publicly traded company owns 10% or more of its stock.

Respondent Lockheed Martin states that the following entities owned 10% or more of its stock as of February 28, 2002 (as filed with the SEC on Schedule 13G pursuant to Section 16(a) of the Securities Exchange Act of 1934):

> State Street Bank and Trust Company, acting in various fiduciary capacities, 3 Pinehill Drive, Batterymarch III, Quincy, MA 02169: 19.6%
>
> U.S.Trust Company, National Association as Trustee for Lockheed Martin Corporation Defined Contribution Plan, 515 Flower Street, #2800, Los Angeles, CA 90071: 19.0%
>
> FMR Corporation, 82 Devonshire Street, Boston, MA 02109: 9.226%

Respondent MagneTek, Inc. ("MagneTek") has no parent corporations, and no publicly held companies own 10% or more of MagneTek's stock.

The parent company of Maremont Corporation is ArvinMeritor, Inc. ArvinMeritor, Inc., a publicly held company, owns 100% of the shares of Maremont Corporation.

Respondent Melrath Gasket, Inc. states that no publicly held

company owns 10% or more of its stock.

Respondent Nitro Industrial Coverings, Inc. ("NICO") had no parent corporations, and no publicly held companies own 10% or more of NICO's stock.

Respondent Oglebay Norton Company, Inc. states that no publicly held company owns 10% or more of its stock.

Respondent Pacific Parts, Inc. states that no publicly held company owns 10% or more of its stock.

Respondent Robertson Ceco Corporation ("Robertson") , successor to H.H. Robertson Company, is a private corporation. Robertson has no parent corporations and no publicly held companies own 10% or more of Robertson's stock.

Respondent Steel Grip, Inc. states that no publicly held company owns 10% or more of its stock.

All shares of The BOC Group, Inc., a Delaware corporation, are owned by BOC, Inc., a Nevada corporation, which is wholly owned by BOC Holdings, an English corporation, which is wholly owned by The BOC Group plc. No publicly held company owns 10% or more of the stock of The BOC Group, Inc.

The Lincoln Electric Company is a wholly-owned subsidiary of Lincoln Electric Holdings, Inc., a publicly-traded company. No publicly-traded company owns 10% or more of the stock of Lincoln Electric Holdings, Inc.

Respondent The Okonite Company has no parent corporation and no publicly owned companies own any of its stock.

Respondent Union Boiler Company states that no publicly held company owns 10% or more of its stock.

Respondent Universal Refractories Corporation, formerly a division of Thiem Corporation, was merged into Thiem Corporation in 1976. Thiem Corporation was dissolved in 1991 pursuant to the Delaware Corporation Code. Consequently, neither entity has a parent corporation. No publicly held companies own 10% or more of the stock of either entity.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENTS	i
TABLE OF AUTHORITIES	viii
REASONS WHY THE PETITION SHOULD BE GRANTED	1
CONCLUSION	3

TABLE OF AUTHORITIES

Page

CASES

Amchem Prods. Inc. v. Windsor,
521 U.S. 591 (1997)..... 1

In re Chevron U.S.A., Inc.,
109 F.3d 1016 (5th Cir. 1997)..... 1

Malcolm v. Nat'l Gypsum Co.,
995 F.2d 346 (2nd Cir. 1993)..... 1

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999)..... 1

The 36 respondents listed herein respectfully submit this response in support of the petition for a writ of certiorari pursuant to Supreme Court Rule 12.6. As demonstrated below and in the petition filed by Mobil Corporation and Honeywell International, Inc., this Court's review is necessary to address the important and urgent constitutional questions raised by the consolidation of thousands of individual cases for trial.

REASONS WHY THE PETITION SHOULD BE GRANTED

The trial which is scheduled to take place on September 23, 2002 will be the seventh asbestos personal injury "mass liability trial" to be scheduled or take place in the West Virginia state courts[1]. The first consolidated asbestos mass liability trials which took place in West Virginia occurred before the decisions in Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997), Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2nd Cir. 1993), and In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) were published.

If there was ever any doubt concerning the unconstitutionality of the mass trial procedure adopted by the West Virginia state courts, that doubt has been removed. A large-scale, aggregated liability trial of the type and scope contemplated cannot take place without violating the parties' rights to due process of law. Yet the West Virginia state courts continue to aggregate thousands of asbestos personal injury cases for a single trial without making any inquiry into the

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[1]None of the West Virginia mass trials which have taken place to date have included any defendants sued under a premises liability theory.

commonality of the claims or into what prejudice would result from the consolidation.

Given the manner in which this group of cases have been filed and consolidated it is difficult to determine the precise number of individual claims involved. The petition lists approximately 250 defendants who are parties to this consolidated trial (Petition, at ii; App. 147a-156a). It appears that tens of thousands of individual (one plaintiff versus one defendant) claims have been aggregated for a single "mass liability" trial in the Circuit Court of Kanawha County, West Virginia on September 23, 2002. This consolidation of tens of thousands of individual claims for a single trial deprives all parties of their rights to due process of law, and is fundamentally unfair and flawed.

CONCLUSION

For the reasons set forth in this response, and for the reasons set forth in the petition filed on behalf of Mobil Corporation and Honeywell International, Inc., the petition should be granted.

Respectfully submitted,

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MOBIL CORPORATION and
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BRUCE W. ATKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	12
I. THE INTERLOCUTORY DECISION OF THE STATE SUPREME COURT IS NOT A REVIEWABLE "FINAL JUDGMENT."	12
II. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW	16
A. The State Supreme Court *Did Not Hold* That Thousands Of Claims Could Be "Aggregated For A Mass Liability Trial" Without "Any Inquiry Into The Commonality Of Those Claims Or The Prejudice That Would Result From Such An Extraordinary Undertaking."	16
B. Petitioners Will Be Entitled To Seek Review Of Their Claim That A "Common Issues" Trial Violated Their Due Process Rights When The Facts Necessary To Rule On That Issue Have Been Established	19
C. The West Virginia Courts' Preliminary Plan To Employ "Common Issues" Trials Followed By Small-Group Trials On Remaining Issues Is Entirely Consistent With The Federal Circuit Court And State Intermediate Appellate Court Cases Cited By Petitioners	21
III. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW	25

TABLE OF CONTENTS—Continued

Page

A. The Supreme Court Of West Virginia *Did Not Hold* That The "Due Process Clause Permits A State Court To Apply Its Own State Law" To Cases That "Have No Connection At All To The State." 25

B. The "Choice Of Law" Cases Cited By Petitioners Are Irrelevant. 27

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) 2, 16
Board of Education v. Superior Court, 448 U.S. 1343 (1980) 15
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 15
Fisher v. District Court, 424 U.S. 382 (1976) 14
Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) 21
Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954) 23, 24
In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002) 29
In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) 22, 23
In re: Federal-Mogul Global, Inc., 2002 U.S. App. LEXIS 15331 (3d Cir. Jul. 31, 2002) 4
Jefferson v. City of Tarrant, 522 U.S. 75 (1997) 12, 13, 15
Madruga v. Superior Court, 346 U.S. 556 (1954) 14
Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993) 21, 22
North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1973) 13
Phillips v. Shutts, 472 U.S. 797 (1985) 27, 28

STATE CASES

ACandS v. Godwin, 667 A.2d 116 (Md. 1995) 5
Hime v. State Farm Fire & Casualty Co., 284 N.W. 2d 829 (Minn. 1979) 29
McBride v. Galaxy Carpet Mills, 920 F. Supp. 1278 (S.D. Ga. 1995) 29

TABLE OF AUTHORITIES—Continued

Page

Nicolet, Inc. v. Superior Court, 224 Cal. Rptr. 408 (Cal. Ct. App. 1986) 29

Todd-Stenberg v. Dalkon Shield Claimants Trust, 56 Cal Rptr.2d 16 (Cal. Ct. App. 1996) 25

Union Pac. Res. Group, Inc. v. Hankins, 51 S.W.3d 741 (Tex. Ct. App. 2001) 25

West Virginia ex rel. Allman v. MacQueen, 551 S.E.2d 369 (W. Va. 2001) 4, 5, 7

West Virginia ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996) ...2, 3, 4, 19

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is seriously incomeplete with respect to both questions purportedly presented by the petition. Although the first question presented states that the claims below were aggregated "without any inquiry into the commonality of those claims," they were in fact grouped together under West Virginia Trial Court Rule 26.01 only *after* a lengthy inquiry that included hearings, live testimony, findings, recommendations by a trial judge, and review by the Chief Justice of the Supreme Court of Appeals of West Virginia. The second question presented states that the court below held that West Virginia law will be applied to all of the plaintiffs' claims without identifying where the court made that holding. In fact, the State Supreme Court did not even address choice of law issues.

1. *The Asbestos Litigation Crisis.* As petitioners acknowledge, "[t]his country is in the midst of an 'asbestos-litigation crisis.'" Pet. 3 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997)). The "litigation" crisis has arisen from an asbestos health crisis which resulted from manufacturing and industrial use of asbestos in products and premises long after its deleterious effects on human lungs became known. Although it is difficult to establish the precise number of asbestos-related suits nationwide, there were approximately 200,000 cases pending as of 1999. Pet. 3 n.2. Those cases are not, of course, evenly distributed across the fifty states; many are concentrated in areas, including West Virginia, where there are high levels of asbestos-related disease and mortality.[1] In 1996, the Supreme Court of Appeals of West Virginia found that the "sheer volume" of asbestos cases confronting the state's courts "threaten[ed] to cripple the common law system of adjudication" by "paralyzing the[] [lower courts'] active dockets." *West Virginia ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 303-04 (W. Va. 1996).

This Court has recognized the daunting nature of the asbestos-litigation problem. In *Amchem*, the Court quoted findings of the Judicial Conference Ad Hoc Committee on Asbestos Litigation that "dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." *Amchem*, 521 U.S. at 598. As a result, state and federal courts have been "forced . . . to adopt diverse, innovative, and often non-traditional

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[1] West Virginia has the third-highest asbestosis crude mortality rate among the fifty states. Centers for Disease Control and Prevention *et al.*, *Work-Related Lung Disease Surveillance Report 1999*, figure I-5.

judicial management techniques to reduce the [paralyzing] burden of asbestos litigation." *Appalachian Power*, 479 S.E.2d at 304.

2. *Background of West Virginia Trial Court Rule 26.01.* Contrary to petitioners' suggestions, neither West Virginia Trial Court Rule 26.01 nor the procedures preliminarily contemplated by the pre-trial orders represent a break with the state's past practice in asbestos litigation. Rather, those procedures directly reflect the "specialized approach to the asbestos personal injury litigation" that has been developed by the West Virginia courts "over the past twenty years," and repeatedly and successfully applied by those courts to resolve "tens of thousands of asbestos-related claims." Pet. App. 24a-25a. The heart of that approach has been to sever, for initial trial, certain "issues that are common to all or almost all of the parties." Report of Judge Gaughan, Sept. 6, 2001 ("9/06/01 Report"); *see also* Pet. App. 25a. Subsequent proceedings, involving small groups of plaintiffs and their "common defendants," then address remaining issues, including those relating to exposure, causation, and damages. Pet. App. 28a-29a.

The "common-issues trial" approach to asbestos litigation has been used in West Virginia at least since 1989, although it was first approved by the State Supreme Court in *Appalachian Power* in 1996. "Common issues" trials on product liability claims have generally involved determine-ation by a single jury of whether (and during what time period) each supplier defendant's products were defective. "Common issues" trials on premises liability claims have been designed to determine whether (and during what time period) each premises defendant failed to maintain a reasonably safe workplace.

In *Appalachian Power*, the State Supreme Court found that while this "common issues" approach represented a "novel method of fact resolution," nothing about it was inherently

prejudicial to the defendants and, indeed, that "there [was] much in the Plan to recommend it to all parties because it represents an effective and efficient manner to bring closure to these [more than one thousand] cases without depleting valuable resources in the event that they are needed to satisfy a monetary award." 479 S.E.2d. at 305. Much of the efficiency derives from the elimination of repetition of certain witnesses and evidence. As one of the judges who presided over the *Appalachian Power* litigation observed in connection with his earlier experience of claim-by-claim asbestos litigation: "The anatomy of an asbestos trial, about 50 percent of it, never changed. It was exactly the same, every case . . . . [Y]ou'll have a little scientific evidence on what [asbestos] is, and then how does it hurt somebody if it's inhaled. And then you've got this big body of state of the art evidence, . . . the information about who knew what when, or when certain knowledge was available. . . . [W]ith respect to each defendant, what they knew and when they knew it determines their liability. That is repeated every time a case is tried, time and time again." 11/08/00 Tr. 56-57.[2]

"[T]o fully utilize" the concept of "common-issues" trials, the *Appalachian Power* court "assigned three circuit court judges to preside over [common-issue] trials of [all] those asbestos-related cases which were [then] pending on the dockets of circuit courts throughout the state." *West Virginia*

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[2] With respect to Mobil's contentions, efficiency would be gained by determining once, for all of the affected cases, whether the asbestos in Mobil's products really was encapsulated in a manner that precluded the release of fibers into the air, rather than having that issue (and others like it) determined separately in hundreds of repetitive individual trials. The automobile manufacturer defendants (DaimlerChrysler Corp., Ford Motor Corp. and General Motors Corp.) recently sought transfer of many thousands of asbestos claims across the country in order to obtain a consolidated determination of a similar encapsulation defense. *See In re: Federal-Mogul Global, Inc.*, 2002 U.S. App. LEXIS 15331 (3d Cir. Jul. 31, 2002).

ex rel. Allman v. MacQueen, 551 S.E.2d 369, 371 (W. Va. 2001). Pursuant to that order, a series of six common-issue "trials were held in Kanawha County and Monongalia County, with the last [of these] common-issue trials held in 1998." *Id.* at 371 & n.6. Those six trials "resulted in the resolution, in whole or in part, of what is estimated to be over 20,000 asbestos-related cases." *Id.* n.6.

West Virginia is by no means alone among the states in its use of common-issue trials to successfully manage the enormous caseloads created by asbestos litigation. The Maryland courts, for example, ordered the consolidation of more than 8,500 individual actions, initially involving over 100 different defendants. *See ACandS v. Godwin*, 667 A.2d 116, 120 (Md. 1995). The Maryland litigation—like the preliminary case management plan in the present case—divided the proceedings into phases, the first of which resolved "common issues" related to negligence and strict liability. *Id.* at 144-45. As here, questions specific to individual plaintiffs and defendants, including issues of causation and damages, were left to subsequent phases of the litigation. *Id.* at 121.

The Maryland Court of Appeals rejected defendants' claim that the "common issues" approach denied them due process—a claim based on the allegation that "the 8,555 plaintiffs in the consolidation have different occupations, were exposed at different times, at different workplaces, have different diseases, and different medical histories." *Id.* at 146. Specifically, the Court of Appeals found that "none of these factors diminishes the commonality of the Phase I issues." *Id.* Citing a long history of state and federal asbestos cases in which consolidation and common-issues trial methods had been used and upheld on appeal, the Court of Appeals found it "senseless to repeat the presentation of the same evidence against the same defendants in successive, individual trials or mini-consolidations." *Id.* at 146-49.

3. *The Operation of TCR 26.01.* Following the resolution of the Kanawha and Monongalia County cases, the State Supreme Court developed a generalized procedure "by which [alternatives to the traditional case-by-case trial] could be examined [in various mass litigation situations] and appropriate trial management plans could be developed." *Allman*, 551 S.E.2d at 371. That generalized procedure is set forth in Trial Court Rule 26.01, adopted by the court in July 1999. *See id.* at 371 & n.7.

Rule 26.01 establishes a permanent "Mass Litigation Panel" ("Panel") consisting of six circuit judges appointed by West Virginia's Chief Justice to three-year terms. Pet. App. 36a (TCR 26.01(a)). The rule confers on that Panel the same powers exercised by the judges appointed in Kanawha and Monongalia County cases to "develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of [such] litigation." *Id.* (TCR 26.01(b)). Rule 26.01 also sets forth procedures for referring cases to the Panel. Specifically, any party, judge, or the administrative director of the West Virginia courts may file a motion seeking referral of actions to the Panel. The motion must identify, *inter alia*, "the nature of the actions sought to be referred," the "basis for the request," and "a listing of the particular cases in all the circuits for which a referral is being requested." *Id.* (TCR. 26.01(e)). That motion must be "served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director." Following service, "[a]ny party shall have twenty (20) days . . . to file a reply memorandum stating its position and opposition, if any." *Id.* "Any affected judge may file a reply memorandum within ten (10) days thereafter." *Id.* Finally, after the filing of a motion and replies, the Chief Justice of the State Supreme Court may either act directly on the motion or recommend a hearing to inquire further into the desirability of the proposed referral. *Id.*

4. *The Present Proceedings.* The present petition involves cases brought by approximately 8,000 asbestos plaintiffs referred to the Mass Litigation Panel pursuant to a motion under 26.01(e). That motion, filed by two West Virginia circuit court judges in June 2000, was referred, together with opposing memoranda, by the Chief Justice to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer." 11/17/00 Administrative Order at 1. In October 2000, the judge held a status conference to determine goals for the hearing, and determined that an inquiry into common issues of law and/or fact would be a critical issue. At the hearing in November 2000, the judge heard lengthy argument and testimony on that subject. Counsel for one defendant argued that the cases should not be referred because they lacked sufficient "commonality," while a representative for most of the remaining defendants indicated that "there are some common issues and that there is a basis, under Rule 26 . . . for [a referral to the Panel]." 11/08/01 Tr. 46. Following the hearing, the Chief Justice issued an administrative order accepting the recommendation that the referral motion be granted. 11/17/00 Administrative Order.

The trial judge initially assigned to develop a case management plan for the referred cases developed a plan that called for a series of traditional trials on "all issues" between small groups of plaintiffs and defendants. Both plaintiffs and defendants sought extraordinary relief from the West Virginia Supreme Court to prevent this plan from going into effect. The State Supreme Court ruled that the challenged case management plan did not "fully meet" the need for a "fair[] and expeditious[]" approach to resolving the pending asbestos cases, and set forth a "fourteen-point directive for the trial court [to follow] in connection with the management of these cases." *Allman*, 551 S.E.2d at 375-78; *see also* Pet. App. 4a.

After that decision, the West Virginia Chief Justice designated a new supervising judge, who met with counsel representing plaintiffs and defendants and, in September 2001, adopted a "Report" setting forth the general approach to case management that he intended to adopt. In particular, the Report canceled the "all issues" trials that were previously scheduled and contemplated that all cases not successfully mediated by March 4, 2002 would be categorized into three groups and scheduled for initial trials of "issues that are common to all or almost all of the parties" within each group—precisely as had been done in the similar Kanawha and Monongalia County cases. Report at 6. The Report noted, however, that "the trial plan has not been solidified," and that the judge would continue "to develop a process which will eliminate the need for repetitive discovery depositions, interrogatories, requests for admissions, etc." Report at 8.

After the issuance of the September 2001 Report, Mobil filed a motion in the State Supreme Court seeking a writ of mandamus or prohibition to prevent implementation of the Report's provisions. Mobil claimed that the trial court's failure to conduct an evidentiary hearing pursuant to W. Va. R. Civ. P. 42 on the question whether "mass litigation" could provide a fair determination of the claims presented was clear error—notwithstanding that the question whether "mass litigation" treatment was appropriate for these cases had already been the subject of a motion, memoranda, hearings, and a determination by the Chief Justice under Rule 26.01(e).

In February 2002, the trial court issued a "Scheduling Order" ("Order") further developing the case management plan. That Order indicated that the court planned to implement a "trial format . . . substantially identical to the previous consolidated 'mass trials' [in Kanawha and Monongalia Counties]." Pet. App. 25a. Specifically, the cases would be divided into three groups reflecting the "general types of causes of action asserted by the plaintiffs":

"(1) product liability claims; (2) premises liability claims; and (3) claims by employees against their employers under the provisions of W. Va. Code § 23-4-2." Pet. App. 25a. The Order also indicated that the first phase, or "common issues" phase, of trial would be targeted to "determin[ing] the common issues of fault" within those groups of cases. *Id.* at 26a. The Order emphasized that, as in the earlier common issues trials, the "common issues" phase of trial for products liability claims would require the jury to make individualized findings as to each defendant, including "whether and for what time period [that defendant] sold or distributed a defective asbestos-containing product." *Id.* The specific "common issues" to be tried were, however, left for future determination.

The Order also addressed additional proceedings to be held after the close of the "common issues" phase of trial. Specifically, the court indicated that "[n]ew juries" would be impaneled for "mini-trials" as to causation and damages. Pet. App. 28a. These mini-trials "will consist of a number of plaintiffs against their common defendants," with the groups "based on causes of action, geographic locations, and similar exposure criteria." *Id.*

5. ***The Decision of the State Supreme Court.*** In April 2002, the State Supreme Court issued an opinion addressing Mobil's request for a writ of mandamus or prohibition to prevent further development and implementation of the preliminary case management plans set forth in the Report and the Order. The court first rejected Mobil's argument that the trial court was obliged to hold an evidentiary hearing pursuant to W.Va. R. Civ. P. 42 as to whether these cases were appropriate for consolidation. The court explained:

> Mobil overlooks the fact that the purpose of those findings [is] only to make the *initial* determination of whether the cases should be grouped together for trial purposes. With the operation of TCR 26.01, the

> determination of the need to group cases as "mass litigation" for trial purposes is made through a process that operates in a distinct fashion. . . . Because this Court has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance. We are long past the initial determination, which was reached by this Court in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes.

Pet. App.13a.

The court then turned to an analysis of Mobil's claim that pursuing a "common issues trial" approach to these cases would necessarily abridge Mobil's due process rights. This claim, the court concluded, was "simply premature":

> Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation, Mobil's contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature. We cannot, in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations.

Id.

Not surprisingly, the State Supreme Court did not address Mobil's claim that "consolidation" of these asbestos cases under Rule 26.01 was "unsuitable" because it would require the trial court to confront difficult choice of law issues. As the State Supreme Court was well aware, the trial court—which had not yet even finalized its case management approach—had not yet reached a point in the proceedings where it would have been appropriate to consider choice of law issues. Indeed, the September 2001 Report and February

2002 Order did not contain a single word addressing choice of law. Accordingly, on this issue, there was nothing for the State Supreme Court to review.

One justice of the State Supreme Court issued a concurring opinion expressing reservations, and sharing Mobil's concern that the trial judge ultimately would be unable to successfully negotiate what he termed the choice of law "minefield." Pet. App. 22a. But the concurring justice nonetheless concluded that "at this juncture at least, Mobil's claims of due process violations are premature because the trial court has not completed its trial plan." *Id.* at 19a.

On August 12, 2002—more than eight months after Mobil filed its petition for review with the State Supreme Court and more than three months after the State Supreme Court issued the decision under review—the trial court addressed the choice of law issue. One of the judges presiding over the "common issues" phase of trial ruled that the judges intended to "apply West Virginia law in all aspects of the first phase [the 'common issues' phase] of this trial." 8/12/02 Tr. 172. He then expressly stated that "to the extent that anybody is aggrieved by that, your objection is noted and preserved" for appeal. *Id.* He also clarified that the ruling did not apply to later phases of the trial: "Right now we are dealing with Phase I. Nobody should read anything into that [choice of law ruling] one way or another" as to later phases. *Id.* at 173.

At the August 12, 2002 hearing, the trial court also addressed the question—deferred by Judge Gaughan's February 2002 Order—of what "common issues" would be tried during Phase 1. Judge Recht indicated that, for the premises cases, the "common issues" questions would essentially track those used in the *Allman* case. 8/12/02 Tr. 218. Judge Stephens indicated that Phase 1 of the manufacturers' trial would proceed based on eleven common

issues identified by plaintiffs. *Id.* at 174-76.[3] As in the earlier product liability trials in the Kanawha and Monongalia County cases, those questions focus the jury's attention on whether (and during what time period) each supplier defendant's products were defective, as well as related issues such as the need for and adequacy of warnings.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review the State Supreme Court's decision not to grant a writ of prohibition. At the time the court entered the judgment at issue, the trial court had not yet decided what common issues would be tried in the first phase of the proceedings or what law would be applied. The court below properly declined to issue an extraordinary writ in those circumstances, but instead correctly concluded that it did "not find the issues ripe for review." Pet. App. 18a. Accordingly, there is no important issue of federal law warranting review by this Court. Nor is there any conflict warranting review. In addition, the interlocutory posture of this proceeding counsels strongly against review by this Court. In fact, there is no final judgment for this Court to review, which is a prerequisite for review by this Court of a state court decision.

I. THE INTERLOCUTORY DECISION OF THE STATE SUPREME COURT IS NOT A REVIEWABLE "FINAL JUDGMENT."

Petitioners ask this Court to review the judgment below even though no trial has been held and no defendant has been found liable. As this Court recently emphasized, however, the statutory provision governing review of state court decisions, 28 U.S.C. § 1257(a), "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81

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[3] As Judge Stephens noted at the hearing, the defendants had declined to identify any common issues. 8/12/02 Tr. 176.

(1997). To be reviewable, a state court judgment must "be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* Plainly, the decision below is not final as an effective determination of this litigation. This case presents no unusual circumstances warranting a departure from this Court's long-established practice of respecting Congress' command that it not intrude into litigation pending in state courts.

The requirement of finality "serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973). Each of these ends is implicated in this case. First, the preliminary nature of this case creates a strong likelihood of piecemeal appeals. Second, a decision by this Court in the present procedural posture is all too likely to be merely advisory, as the issues to be tried, the law to be applied, and the number of defendants going to trial remain subject to change. Third, the review sought by petitioners would amount to an unprecedented intrusion into state court affairs. The State Supreme Court declined to exercise its discretion to review an interim scheduling order because it believed that such interlocutory review would be premature and that any issues not obviated through the actual course of events at trial are likely to be presented more sharply upon a full record. To hold that a state supreme court commits constitutional error by declining to grant extraordinary relief at an interlocutory phase would seriously intrude on the autonomy of state judiciaries.

Although this Court's firm final judgment rule has been in effect "[f]rom the earliest days of our judiciary," *Jefferson*, 522 U.S. at 80, on a very few occasions the Court has

reviewed judgments of state courts where proceedings had not necessarily ended completely. But those cases were very different than this case. Two of the three cases cited by petitioners involved jurisdictional claims that could have ended the litigation. The dispute in *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954), was whether a state court had jurisdiction over a "case for sale of a vessel and partition of the proceeds," or whether "only the United States district court sitting in admiralty could take jurisdiction to consider such a case." Similarly, *Fisher v. District Court*, 424 U.S. 382, 383 (1976), presented the question whether a state court, rather than a tribal court, "has jurisdiction over an adoption proceeding in which all parties are members of the Tribe and residents of the Northern Cheyenne Indian Reservation." Citing *Madruga* and noting that the dispute had been brought to the Montana Supreme Court as an original proceeding seeking an extraordinary writ, the Court in *Fisher* held that "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court." *Id.* at 385 n.7.

This case, like *Madruga* and *Fisher*, arises from a request for an extraordinary writ. But unlike those cases, the jurisdiction of the state court is not at issue and no decision by this Court could have the effect of ending the litigation. At most, petitioners would obtain a judgment from this Court providing guidance on how the trials should be structured and how choice-of-law issues should be resolved. Accordingly, concluding that the decision below is a final judgment would stretch the language of section 1257 far beyond the modest steps this Court has taken in permitting review in unusual cases, and far beyond any sensible meaning of the final judgment language. Indeed, the result petitioners seek would inappropriately relegate section 1257's final judgment rule to

the status of "one of those technicalities to be easily scorned." *Jefferson*, 522 U.S. at 81 (citation omitted).[4]

Recognizing that this Court is reluctant to review cases in an interlocutory posture even where the finality requirement governing state court decisions is not implicated, petitioners argue that they will have to settle because "the underlying claims assert potentially serious personal injuries," Pet. 28, and suggest that review at this time is appropriate for that reason. There is no merit to that contention. Mobil and Honeywell are represented by expert counsel who will have the opportunity to defend their clients on the merits at the appropriate stage of the further proceedings. If their defense is as sound as Mobil suggests, *see* Pet. 4-5, they should proceed to trial.[5] If they are not as sure as the petition

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[4] In addition to *Madruga* and *Fisher*, petitioners cite then-Justice Rehnquist's in-chambers opinion in *Board of Education v. Superior Court*, 448 U.S. 1343 (1980). In the course of denying the requested stay of a busing order, the in-chambers opinion noted that the stay action was an original proceeding seeking an extraordinary writ and stated that "this Court would in all probability have jurisdiction over the present action should a petition for certiorari be filed by the Board." *Id.* at 1346. It appears that the relief requested by the Board would have effectively terminated the busing dispute entirely because the Board argued that any busing in the Los Angeles Unified School District would violate the Fourteenth Amendment. Therefore, the tentative prediction that the Court would have jurisdiction may have been correct. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (recognizing that certiorari has been allowed despite the pendency of further state proceedings where, *inter alia*, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of . . . the state proceedings still to come"). The the in-chambers opinion hardly provides support for the broad extension of section 1257 sought by petitioners, however, since there is no prospect that a decision from this Court will end the litigation entirely.

[5] Of course, petitioners may challenge decisions concerning trial structure and choice-of-law in this Court at an appropriate time. *See* R. Stern *et al.*, *Supreme Court Practice* 155 (8th ed. 2002). They also may

suggests that the asbestos in the products Mobil manufactured could not escape and cause serious injury, they should consider settling.

But requiring the plaintiffs, many of whom have suffered serious personal injury, to litigate one at a time against each defendant—as Mobil argued below (*see* note 6, *infra*)—is not an acceptable solution. As this Court recognized in *Amchem*, 521 U.S. at 598, that approach would lead to "long delays" before trial and to trials that "are too long" because "the same issues are litigated over and over."

II. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW.

A. The State Supreme Court *Did Not Hold* That Thousands Of Claims Could Be "Aggregated For A Mass Liability Trial" Without "Any Inquiry Into The Commonality Of Those Claims Or The Prejudice That Would Result From Such An Extraordinary Undertaking."

Petitioners first argue that this Court should review the State Supreme Court's purported holding that "mass aggregation for trial requires no inquiry into commonality or potential prejudice." Pet. 13. But the decision below did not "hold" any such thing. To the contrary, the court confirmed its earlier determination, made "in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes." Pet. App. 13a.

As described above, that determination was the result of a lengthy process required by Rule 26.01 to ascertain whether sufficient commonality existed in these cases to justify

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again raise the issues presented in their petition, *id.*, although it seems certain that actual decisions will supersede the hypothetical questions presented.

"group[ing them] together for trial." *Id.* The process began in August 2000, when the West Virginia's Chief Justice referred the Rule 26.01 motion to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer." 12/21/00 Administrative Order at 1. It included a status conference in October 2000 at which one of the attorneys for defendants stated that "as the paperwork that we filed on behalf of most defendants [indicated] . . . we like the idea of having a statewide coordinated effort to deal with" these asbestos cases. 10/17/00 Tr. 10. Another defendants' lawyer, representing "nontraditional defendants in [] asbestos litigation," agreed that the best way that this "asbestos litigation . . . [can be] handled . . . [is] through a coordinated effort at the Mass Litigation Panel." 10/17/00 Hearing at 33. But other defendants' attorneys disagreed, and the judge concluded that "the major issue" for a subsequent hearing would be whether the cases "generally come in" under Rule 26.01, that is, "[d]o they involve a common question of fact, common issues?" *Id.* at 23.

The transcript of the November 8, 2000, hearing addressing that "major issue" runs to more than 100 pages. As anticipated, that hearing—attended by counsel for both petitioners—focused primarily on the question of commonality. Counsel for USX and CSX Transportation and Norfolk Southern Railway Company argued that the cases do not present the commonality required by Rule 26, and presented live witnesses testifying in support of that position. However, counsel speaking "on behalf of most of the defendants" presented a contrasting view, stating that "defendants do believe that there are some common issues and that there is a basis, under Rule 26 . . . for the handling of asbestos cases with a referral to the Mass Litigation Panel." 11/08/00 Tr. 45, 46. Counsel for petitioners did not disagree.

In findings of fact and conclusions of law submitted to the Chief Justice on November 15, 2000, the trial court found that

"[t]he plaintiffs and defendants, with the exception of USX and CSX, generally agreed that the cases should be sent to the mass litigation panel." 11/17/00 Order at 2. He acknowledged, however, that "USX and CSX specifically object to their cases being referred with the other asbestos cases. These defendants believe that their cases are not significantly similar as is required by the rule." *Id.* The judge's conclusions of law rejected that argument, however, recommending that "all pending asbestos litigation in the state of West Virginia" be referred to the Mass Litigation Panel. *Id.* at 3. On November 17, 2000, West Virginia's Chief Justice issued an order adopting the lower court's findings and conclusions, and requiring that "[w]ithin 10 days of the entry of this order the plaintiffs in this matter and the defendants in this matter shall each appoint seven representatives to meet with the Mass Litigation Panel to develop specific rules and strategies to deal with the disposition of these cases." *Id.* at 4.

Against this backdrop—entirely omitted by petitioners—it is obvious that the State Supreme Court did not "hold" that referring these cases for consolidated treatment under Rule 26.01 does not require "any inquiry into the commonality of those claims." To the contrary, Rule 26.01 itself requires such an inquiry, and a lengthy inquiry was, in this case, conducted. In rejecting Mobil's claim that the trial judge was required to conduct *another* such inquiry under W.Va. R. Civ. P. 42, the State Supreme Court merely held that "[b]ecause this Court [through the Chief Justice's 11/21/00 Order] has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance. We are long past the initial determination, which was reached by this Court in November 2000, that these cases can, based on the existence of common factual and/or legal issues, be grouped together for trial purposes." Pet. App. 13a.

B. Petitioners Will Be Entitled To Seek Review Of Their Claim That A "Common Issues" Trial Violated Their Due Process Rights When The Facts Necessary To Rule On That Issue Have Been Established.

Distinct from petitioners' incorrect claim that the court below held that no inquiry into commonality of issues was required is their suggestion that *any* common issues trial would necessarily violate their due process rights. The petition argues, for example, that a "common issues" approach will "make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way," thereby violating due process. Pet. 18.[6] As the State Supreme Court correctly held, however, the question whether a "common issues" trial will, at some future time, result in due process violations cannot be addressed in the absence of information that clearly did not exist at the time of the State Supreme Court's review.

The propriety of a "common issues" approach will, of course, depend on factors including the precise common issues tried, the manner and extent to which individual defendants are allowed to present what Mobil terms "unique" defenses, and the means used to obtain from the jury individualized determinations on the issues tried as to each defendant. As the State Supreme Court correctly concluded,

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[6] In its brief to the State Supreme Court, petitioner Mobil put the same point far more starkly, arguing that "individual treatment . . . of each plaintiff's claim is the *only constitutional manner in which to proceed in asbestos*" actions." 12/21/01 Memorandum of Law at 31. When stated so plainly, Mobil's argument is clearly an effort to avoid *any* adjudication of the vast majority of asbestos plaintiffs' claims. As the State Supreme Court pointed out in 1996 in *Appalachian Power*, the disposition of then-pending asbestos cases through "traditional" litigation would have required "approximately 150 judge years." 479 S.E.2d at 303 (citing Jack B. Weinstein, Individual Justice in Mass Tort Litigation 140 (1995)). Such enormous resources are simply unavailable.

however, at the time of the decision below, the trial court had yet to address even the first of these important questions—the identification of "common issues" to be tried.[7] "Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation," the court below held, "contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature." Pet. App. 15a. The court concluded that it could not, "in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations." *Id.*

For the same reason, petitioners' pursuit of this issue before this Court is premature as well. If the injury claimed by petitioners ever progresses from the realm of the purely hypothetical to the actual, they will, of course, at an appropriate time be entitled to seek the review that the State Supreme Court has thus far deemed it unnecessary to provide. And if petitioners' disagree with the result of that review, they will, of course, be free to seek this Court's review. For the moment, however, review of petitioners' claim that a "common issues" trial will violate their due process rights is, as the court below stated, "simply premature" because the facts necessary to rule on that claim have not yet been established.

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[7] As set forth above, that question was not addressed until months *after* the decision below, at a hearing on August 12, 2002. *See supra* at 11-12.

C. The West Virginia Courts' Preliminary Plan To Employ "Common Issues" Trials Followed By Small-Group Trials On Remaining Issues Is Entirely Consistent With The Federal Circuit Court And State Intermediate Appellate Court Cases Cited By Petitioners.

Petitioners maintain that the State Supreme Court's "holding" that "mass aggregation" of cases "requires no inquiry into commonality or potential prejudice" conflicts with decisions of other courts." Pet. 13. There is no conflict.

Petitioners' lead case, *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973), has little in common with the decision below. *Garber* involved a trial court order requiring that three shareholder derivative class actions be re-filed in a single consolidated complaint, "which superseded the complaints filed in the three separate actions." 477 F.2d at 716. The Second Circuit held that the lower court had erred in mandating a single "'mixed bag' type of consolidated complaint."

The *Garber* holding is irrelevant here because the trial court's Report and Order did not require or have the effect of requiring that all asbestos cases in West Virginia be refiled in a single, consolidated complaint. To the contrary, the trial court's preliminary rulings indicate that the separate cases will be divided into three categories for the identification of "common issues" within each category amenable to trial in an initial "common issues" phase of litigation; the cases will then be separated into groups consisting of "a number of plaintiffs against their common defendants"—with the groups "based on causes of action, geographic location, and similar exposure criteria"—for trial of remaining issues. Pet. App. 28a. Nothing in *Garber* is inconsistent with that approach.

Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d Cir. 1993), is equally irrelevant here. That appeal challenged a ten-month, "reverse-bifurcated" (damages, followed by

liability) trial of *all* the issues between 48 plaintiffs and 25 direct defendants, as well as hundreds of third-party defendants and fourth-party defendants added via impleader. 995 F.2d at 349-50. In the first phase of trial, to decide damages, the jury was presented with "detailed testimony for each victim," including "degree of impairment, specific medical history, emotional state, and medical prognosis." *Id.* at 349. The Second Circuit found that the "the maelstrom of facts, figures, and witnesses, with 48 plaintiffs, 25 direct defendants, numerous third-and-fourth party defendants, and evidence regarding culpable non-parties and over 250 worksites throughout the world was likely to lead to jury confusion." *Id.* at 352. It emphasized that its holding was "narrow," and that it did "not wish to be understood as condemning all consolidations of asbestos cases." *Id.* at 354. The court also underscored the significance of the "unique circumstances of this case" in reaching its decision, and relied on the jury's actual verdict with regard to apportionment of liability as evidence of the confusion suggested. *See id.* at 352.

The decision below does not contemplate such an "all issues" trial (or resulting "maelstrom"). As noted above, the preliminary plan approved by the court below calls for an initial phase of trial on a limited number of discrete "common issues" relating primarily to what defendants knew and when they knew it, followed by "mini-trials" between parties grouped together based on precisely the kinds of factors examined by the *Malcolm* court on the issues remaining. Pet. App. 28a. *See Malcom*, 995 F.2d at 350-51. *Malcolm* did not consider, and certainly would not prohibit, this approach.

The Fifth Circuit cases cited by petitioner are still more obviously inapposite. *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), involved thousands of personal injury claims against Chevron arising from its failure to remediate contaminated property prior to selling it to residential

developers. The trial court's case management plan envisioned a "unitary trial on the issues of 'general liability or causation' . . . as well as the individual causation and damage issues" to be held with respect to thirty "bellwether" plaintiffs. *Id.* at 1017. Those plaintiffs would comprise "fifteen (15) of the 'best'" (selected by plaintiffs) and "fifteen (15) of the 'worst'" (selected by defendants) cases contained among the 3,000-member plaintiff group, and the results of that trial would be used to provide information on the value of the cases (as reflected by the jury verdicts) to remaining litigants wishing to settle.

The Fifth Circuit held that the "selected thirty (30) cases . . . are not cases [properly] calculated to represent the group of 3,000 claimants." *Id.* at 1020. Accordingly, the court found, "the results . . . obtained from a trial [would] lack the requisite level of representativeness" to permit reliable inferences to be drawn regarding the remaining cases. *Id.* The "common issues" approach contemplated by the West Virginia courts clearly has nothing in common with the "bellwether" approach disapproved by the Fifth Circuit.

Gwathmey v. United States, 215 F.2d 148 (5th Cir. 1954), is equally far afield. It involved consolidation to establish the value of 236 tracts of land condemned by the federal government in the Cape Canaveral area. This consolidated action attempted to establish the value of all of these parcels in "one massive trial, in which the jury . . . ma[d]e no decision until the completion of all the evidence," presentation of which took "some seven weeks" on the "issue of value alone." *Id.* at 152. The court expressed concern that the trial placed landowners in an "impossible situation." *Id.* at 154. For example, although attorneys and owners often were not present when tracts in which they were not interested were being tried, "Government witnesses repeatedly testified as to comparable sales, physical conditions and other value factors relating to one tract while another

completely separate tract was being tried." *Id.* As a result, "the Government was able repeatedly to restate and emphasize certain of its evidence as to some controversial areas, with cross-examination either not allowed or allowed so long after direct examination that it was totally ineffective." *Id.* The court further observed that "during the trial there were so many tracts and so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times," and concluded that, for these and other reasons, the trial violated the rights of landowners to due process and just compensation. *Id.* at 156.

In the present case, it is obvious that no comparable problems have arisen because no trial has yet occurred. And nor is there any reason to think that similar problems will occur—as repeatedly noted above, the preliminary plans approved by the court below call for a "common issues" phase of litigation addressing a limited number of discrete questions relating to defendants' knowledge of the risks of asbestos and the actions they took (or should have taken) as a result, followed by additional phases of "mini-trials" to address remaining issues, including damages. Petitioners have not presented—and, given the preliminary state of this proceeding, could not now present—any evidence to suggest that the problems noted by the *Gwathmey* court will recur here. Accordingly, there is not—and, at this time, could not be—a conflict between this case and *Gwathmey*.

The state court cases with which petitioners claim "conflicts" merit little consideration. Supreme Court Rule 10(b) lists among the reasons the Court considers for granting certiorari situations where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." But the rule says nothing of decisions by state intermediate appellate courts. Nor should it—such decisions are properly subject to review, in the first instance, by the "state court of

last resort," not this Court. Yet *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal Rptr.2d 16 (Cal. Ct. App. 1996), and *Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741 (Tex. Ct. App. 2001), are obviously intermediate court of appeals decisions. Accordingly, they would present no basis for review by this Court even if they presented an actual conflict with the decision below.[8]

III. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW.

A. The Supreme Court Of West Virginia *Did Not Hold* That The "Due Process Clause Permits A State Court To Apply Its Own State Law" To Cases That "Have No Connection At All To The State."

The second question presented by petitioners is even more obviously not truly presented here. That question is based on a purported "holding" by the State Supreme Court "that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases . . . that . . . have no connection at all to the state." Pet. iii. Again, the court below held no such thing—in fact, at the time of the State Supreme Court's decision, the trial court had made *no*

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[8] But, if anything, these cases *support* the decision below. *Todd-Stenberg upheld* a consolidated trial of three personal injury suits involving pelvic inflammatory disease ("PID") contracted as the result of use of the intrauterine device known as the Dalkon Shield. The court held that the "trial court correctly anticipated that a large portion of the trial would be devoted to issues common to the three cases: how PID occurs, whether it can be caused by the use of Dalkon Shield, and what other factors might cause or contribute to the disease." 56 Cal. Rptr. at 17. The same is true here with respect to asbestos-related diseases—hence the West Virginia courts' use of "common issues" trials. Petitioners' second state case, *Union Pacific*, similarly *upheld* certification of a class of plaintiffs holding royalty interests under 590 oil and gas leases (involving 122 unique lease forms and 58 types of royalty clauses) that sought damages against Union Pacific.

ruling whatsoever on the question of what state or states' law should apply in any of the various asbestos trials contemplated by the court's preliminary case management plan, and the State Supreme Court likewise *did not address this issue in any way.*

The opinion of the State Supreme Court nowhere contains the phrase "choice of law," or "law to be applied," or anything remotely similar. And while the petition contains repeated references to a purported "choice-of-law holding,"[9] petitioners' only efforts to cite to this "holding" are a pair of vague references to page "App. 7a." *See* Pet. 10 & 22. There are, however, *no* "holdings" of any sort—let alone a choice-of-law holding—on "App. 7a." That page merely reproduces a portion of the "Procedural Background" section of the lower court's opinion, not any part of the court's legal analysis. And "App. 7a" does not even mention choice of law, or anything related to it.[10]

After the decision below—more than three months after, at an August 12, 2002 hearing—the trial court ruled on choice of law, at the urging of counsel for numerous major defendants. Specifically, Mr. David Hendrickson, counsel for Shell Oil and other defendants in these proceedings, stated to

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[9] *See, e.g.*, Pet. iii, 10,11-12, 21, 22, 26.

[10] Petitioners' statement that the lower court's purported choice of law "holding" applied to only "one group of defendants," suggests that they may be misinterpreting the State Supreme Court's description of the three "trial groupings" contemplated for the "Phase I" proceedings as a ruling on choice of law. As the court below recited at Pet. App. 7a, the trial court had grouped the causes of action alleged by the plaintiffs into three categories: "(1) product liability claims; (2) premises liability claims; and (3) deliberate intent causes of action asserted under West Virginia Code § 23-4-2 (1994)." The final group comprises claims based on the "deliberate intent" provision of West Virginia's Workers' Compensation Act. Clearly, however, nothing in the lower court's reiteration of the categories tentatively established by the trial court constituted a choice of law ruling of any kind.

the presiding judges: "I take it you all haven't made a ruling on [choice of law]. . . . I just would like to know, [as to] . . . common issues . . . whether we are going to deal with that briefly, your Honor." 8/12/02 Tr. 170-71. One of the trial judges responded that the judges intend to "apply West Virginia law in all aspects of the first phase [the "common issues" phase] of this trial." *Id.* at 172. The judge then expressly stated that "to the extent that anybody is aggrieved by that, your objection is noted and preserved" for appeal. *Id.* He also clarified that the ruling did not apply to later phases of the trial: "Right now we are dealing with Phase I. Nobody should read anything into that [choice of law ruling] one way or another" as to later phases. *Id.* at 173.

Accordingly, as of August 12, 2002, petitioners (and the other defendants) *do* have a decision on choice of law as to "Phase I" (and only "Phase I") of the proceedings contemplated by the trial court. Petitioners are, as the trial court suggested, entitled to seek review of that decision in the State Supreme Court at an appropriate time. Until such review takes place, however, it would clearly be premature for this Court to intercede.

B. The "Choice Of Law" Cases Cited By Petitioners Are Irrelevant.

Petitioners argue that the purported "choice-of-law decision" below conflicts with this Court's holding in *Phillips v. Shutts*, 472 U.S. 797 (1985). In *Phillips*, this Court held that in order for a forum state—Kansas, in that case—to apply forum law to claims asserted by a class action, the state "must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22. Significantly, however, even though some "97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit," *id.* at 814-15, this Court held that there could be no constitutional

defect in Kansas' application of forum law without a prior showing of an actual conflict on issues relevant to the case: "We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816.

In the present case, petitioners have not only failed to demonstrate—either to the courts below or to this Court—any "material" conflict between West Virginia law and that of another state: they have not even made any specific showing of *which* other states' laws might apply to the case. To allege, therefore, that "[t]he decision below, forgoing any inquiry into the existence of contacts sufficient to justify application of forum, cannot be reconciled with the precedent of this Court," Pet. 23, not only misstates what the State Supreme Court actually decided, but also ignores the preliminary conditions that *Phillips* established as a basis for invoking such an inquiry.

The lone "example" that petitioners offer of a "conflict" between West Virginia's products liability law and that of other states is the claim that some states have rejected traditional "pure joint and several liability as fundamentally unfair to defendants." Pet. 25. The sole state authority that petitioners cite in support is a Kansas Supreme Court decision criticizing traditional joint and several liability. *Id.* But petitioners have presented no evidence, either to this court or the courts below, showing that any plaintiffs are properly subject to Kansas law on this issue. Petitioners also ignore the fact that questions of joint and several liability clearly are not "common issues" to be addressed in Phase I of these proceedings, but plaintiff-specific issues to be addressed in the "mini-trials" conducted *after* the "common issues" phase. Pet. App. 28a. Such trials will, of course, present their own choice-of-law issues, and the opportunity to address those issues.

The cases petitioners cite to illustrate lower courts' application of *Phillips* similarly show that petitioners have failed to carry their burden to establish the existence of material conflicts. In *Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408 (Cal. Ct. App. 1986), for example, the California Court of Appeals held that before applying the "governmental interest analysis" required by *Phillips*, the court would first have to "determine whether in fact Pennsylvania law conflicts with California law" on the issues presented. *Id.* at 416. Similarly, the Minnesota Supreme Court inquired into the existence of a material conflict in upholding the application of forum law in *Hime v. State Farm Fire & Casualty Co.*, 284 N.W. 2d 829, 823 n.1 (Minn. 1979). Likewise, in *McBride v. Galaxy Carpet Mills*, 920 F. Supp. 1278 (S.D. Ga. 1995), the district court determined that *Phillips* prevented the application of Georgia law to a nationwide class action, but only after an express finding that an "overwhelming majority of the potential class members purchased carpeting in states other than Georgia" and that, because of a substantive, material conflict, applying Georgia's law of punitive damages "would be unfair to those plaintiffs residing outside the state of Georgia." *Id.* at 1285.[11]

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[11] Petitioners' citation to *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), in support of their claim that *any* choice of law inquiry would necessarily violate their due process rights, is clearly inapposite. *Bridgestone* had nothing to do with due process; it merely declined Rule 23 certification for a class of owners or lessees of "[m]ore than 60 million tires and 3 million vehicles" in all 50 states. Because "[n]o class action is proper unless all litigants are governed by the same legal rules," due to the "commonality and superiority requirements of Fed. R. Civ. P. 23(a)," the court found that a class of plaintiffs who could not all be properly subject to the laws of a single forum should not be certified. *Id.* at 1015. Of course, since the present case is not a class action—and, indeed, the cases will ultimately be broken into small "mini-trials" for trials on most issues—*Bridgestone* has no application here.

Petitioners have failed to present even a single substantive issue to be tried as part of the common issues phase of the present case on which an actual conflict between West Virginia law and that of another relevant jurisdiction exists. In all likelihood, there are a handful of material conflicts that could potentially arise in connection with adjudication of the issues to be litigated here. But, of course, at this point we, like petitioners, are merely speculating—the only way to determine the nature and number of relevant conflicts is to inquire into them, and the decision that petitioners ask this Court to review did not do so. Accordingly, it would clearly be premature for this Court to intervene.

CONCLUSION

The petition for a writ of certiorari should be denied.

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MOTION FILED
AUG 28 2002

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No. 02-132

In The
Supreme Court of the United States

MOBIL CORPORATION AND
HONEYWELL INTERNATIONAL, INC.,

Petitioners,

v.

BRUCE W. ADKINS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE UNOFFICIAL COMMITTEE OF SELECT ASBESTOS CLAIMANTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Unofficial Committee of Select Asbestos Claimants ("SAC") respectfully moves for leave to file the attached brief amicus curiae in this case. Consent of the petitioners has been obtained. Counsel for respondents has refused consent. Letters reflecting petitioners' consent and respondent's refusal are on file with the Clerk.

The SAC is a group of law firms representing cancer victims who are plaintiffs in asbestos litigation. The SAC is directed by a steering committee consisting of the undersigned firms and others. They are adverse to many of the petitioners in their own tort suits which are pending in courts around the country. They share the petitioners' belief, however, that there is an asbestos litigation crisis, and that this case presents a critical opportunity for this Court to restore some minimal, threshold balance and fairness to the asbestos litigation system.

Inasmuch as the cancer claimants are vigorously opposed to petitioners on the merits of their asbestos cases, yet are in profound agreement on the need for asbestos litigation reform, the Court would benefit from the SAC's perspective in this case. We respectfully submit that it would be of substantial help to the Court to have the views of the relatively small number of claimants who truly suffer from a debilitating asbestos-related disease, or are the survivors of those who have died of an asbestos-related cancer. Such claimants are gravely prejudiced by the operation of the present system, and proceedings such as the West Virginia mass consolidation are engines of that system.

The SAC thus respectfully requests leave to file the brief amicus curiae which follows below.

Respectfully submitted,

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 4

CONCLUSION 8

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 5

In re Asbestos Prods. Liab. Litig. (No. VI), 1996 WL 539589 (E.D. Pa. Sept. 12, 1996) 5

In re Collins, 233 F.3d 809 (3d Cir.), cert. denied sub nom. *In re Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) 5

In re Federal-Mogul Global, Inc., ___ F.3d ___, 2002 WL 1763923 (3d Cir. July 31, 2002) 1, 2

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) 7

In re Patenaude, 210 F.3d 135 (3d Cir.), cert. denied, 531 U.S. 1011 (2000) 2

Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir.), aff'd, 521 U.S. 591 (1997) 2

OTHER AUTHORITIES:

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Committee on the Judiciary, 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) 5

Edley & Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 Harv. J. Legis. 383, 384, 393 (1993) 5

BRIEF OF AMICUS CURIAE UNOFFICIAL COMMITTEE OF SELECT ASBESTOS CLAIMANTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The Unofficial Committee of Select Asbestos Claimants ("SAC") consists of law firms that represent asbestos claimants who have a documented cancer diagnosis, or who are the survivors of persons who died of asbestos-related cancer.[1] The SAC is directed by a steering committee composed of the undersigned law firms and others, and includes many other firms as well. The SAC represents these claimants' interests in federal and state court proceedings. The Committee also actively participates in the bankruptcy cases of numerous asbestos companies, including the five cases recently consolidated in the United States Bankruptcy Court for the District of Delaware, see *In re Federal-Mogul Global, Inc.*, ___ F.3d ___, 2002 WL 1763923, *2 (3d Cir. July 31, 2002), as well as the reorganizations of Pittsburgh Corning Corp., case no. 00-22876 (Bankr. W.D. Pa); GAF Corp. (G-I Holdings, Inc., and related filings), case no. 01-30135 (Bankr. D.N.J.); and Babcock & Wilcox Co., case no. 00-0558 (Bankr. E.D. La.).

The SAC estimates that cancer claimants comprise fewer than ten percent of the total number of asbestos claims pending in this country. Although the SAC does not know what percentage of the plaintiffs in the West Virginia

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[1] Pursuant to Rule 37.6, the SAC states that no counsel for any petitioner or respondent authored this brief in whole or in part, and no person or entity other than the undersigned SAC counsel made any monetary contribution to the preparation or submission of the brief.

consolidation are cancer claimants, it is also likely to be less than ten percent.

Cancer claimants are not the type of unimpaired claimant whose numbers are said to be inexplicably proliferating, and whom petitioners assert are responsible for the recent bankruptcy filings and overall asbestos litigation crisis. In fact, cancer cases have remained steady over the last few years and will eventually disappear without causing a single additional bankruptcy.

The physical and emotional harms suffered by cancer claimants are indisputable and profound. The signature asbestos-related cancer, mesothelioma, is an "invariably fatal cancer . . . for which asbestos exposure is the only known cause . . . [,]" *In re Patenaude*, 210 F.3d 135, 138 (3d Cir.), cert. denied, 531 U.S. 1011 (2000), and which kills its victims "generally within two years of diagnosis[,]" during which "[m]esothelioma victims invariably suffer great pain and disability." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir.), aff'd, 521 U.S. 591 (1997).

The SAC is opposed to the petitioners on the merits of the claims, and we dispute vigorously many of the factual assertions in their briefs. For instance, while petitioner Mobil Corp. protests that "[t]here is no scientific evidence that Mobil's products can cause asbestos-related diseases[,]" petition at 18 (emphasis petitioner's), this assertion is unsupported and is, of course, a matter for juries to determine. Similarly, the automakers assert that there is no evidence that asbestos exposure during brake work causes disease. See Memorandum of DaimlerChrysler Corp., Ford Motor Co. and General Motors Corp. in Support of Petition for Certiorari at 8-9. This is assuredly not so, as the Third Circuit noted a few weeks ago. See *In re*

Federal-Mogul Global, Inc., supra, 2002 WL 1763923, at *17 ("The arguments of [the automakers] are based on their optimistic view that a *Daubert* hearing would lead to the rejection of the causation claims of all Plaintiffs. However, the evidence creates an issue that could well go either way as to whether Plaintiffs satisfy the *Daubert* gatekeeping standard.").

The SAC likewise does not join in many of the complaints about the West Virginia courts' approach to tort litigation in general, or to mass tort litigation in particular. For instance, we do not agree that the application of West Virginia law to the consolidated cases is necessarily wrong, and we certainly do not join in the argument that such a choice of law is an error of constitutional dimension.

While we are adversaries, however, we share petitioners' conviction that the asbestos litigation system is fundamentally broken. As petitioners demonstrate, the present system has resulted in an unprecedented wave of corporate bankruptcies. As a practical matter, this leaves many of the truly injured asbestos claimants with little or no opportunity for fair compensation. In some cases claimants are left with no compensation at all. The flood of meritless cases effectively leaves the genuine claimants without a remedy at all, or with a plainly insufficient and unjust remedy.

Mass consolidations such as this effectively make viable thousands of claims brought by unimpaired persons. The lack of any meaningful opportunity to discover the facts or defend the merits of these cases, combined with the irresistible settlement pressure generated by the format of the proceeding, enables unimpaired claims to

escape scrutiny and be paid. Without opportunities for such mass, forced processing of bogus claims, many of them would be defeated, thus preserving resources for the truly injured victims.

The SAC's clients are thus victims of the present system, the ills of which are embodied in the extreme in the West Virginia consolidation. These cancer claimants have a profound interest in the Court's acceptance and treatment of this case.

SUMMARY OF ARGUMENT

Mass consolidated proceedings, like the one in this case, force defendants to settle thousands of meritless claims. Such consolidations thus invite the filing of many thousands more such claims, resulting in wave after wave of corporate bankruptcies. This in turn leaves genuinely sick claimants uncompensated.

The SAC, representing those with asbestos-related cancer or their survivors, urges the Court to grant certiorari in this case. It presents an opportunity to set minimal constitutional standards for large aggregative proceedings of this type. Such standards are a matter of fundamental fairness not only to defendants, but also to the truly ill and their survivors, whose rights are effectively compromised by such consolidations.

ARGUMENT

As petitioners illustrate, the vast majority of present asbestos claimants are unimpaired – "people who have

been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, before the House Committee on the Judiciary, 106th Cong. at 5 (July 1, 1999) (statement of Professor Christopher Edley, Jr., Harvard Law School). In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), Justice Breyer observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." *Id.* at 692, quoting Edley & Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 Harv. J. Legis. 383, 384, 393 (1993). SAC members, with long experience in asbestos litigation, know that the figure today is much closer to 90%.

The SAC's clients are terribly prejudiced by these claims, for they use up the resources that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir.), cert. denied sub nom. *Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted); see also Edley & Weiler, supra, at 393. Judge Weiner, who oversees the federal asbestos MDL proceedings, has stated that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignant cases." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E.D. Pa. Sept. 12, 1996).

Virtually all of the companies recently to have filed for bankruptcy protection because of asbestos liabilities have blamed the filing on the avalanche of unimpaired claims. The first-day "informational brief" of Federal-Mogul Global,

Inc. in the United States Bankruptcy Court for the District of Delaware is typical:

> "By 1992, 60-70% of new claims were being filed by individuals who had a "marker" of asbestos exposure, pleural plaques, but who suffered no asbestos-related impairment. As Justice Breyer observed, "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though a statistical majority of the individual litigants will never become impaired."
>
> In addition, mass screening programs have fostered huge numbers of claims by those who are unimpaired. As Judge Weinstein observed when presiding over the Johns-Manville bankruptcy: some plaintiffs' attorneys "have filed all of their cases without regard to the extent of injury . . . ."
>
> Many individuals file claims, despite their lack of impairment, based solely on the fear of future disease or to avoid statutes of limitation. As Dr. Louis Sullivan, the former Secretary of the Department of Health and Human Services, recently testified before Congress, these are "mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation."

App. 4-7.[2] In a footnote, the debtor cited *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F.Supp. 1053,

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[2] The relevant portion of Federal-Mogul's brief is included as an appendix to this brief.

1057 (D. Mass. 1989), for the proposition that "many of these cases result from mass x-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."

The natural supposition is that claims by persons with no impairment could and would be defeated in court, leaving the companies solvent and able to pay the claims of truly deserving plaintiffs. It is precisely mass consolidations such as this one, however, that prevent this result. The enormous, irresistible settlement pressure generated by these proceedings, and the lack of any ability to discover even the most basic facts of each case, is detailed by petitioners. The SAC respectfully urges the Court to grant certiorari because the cancer claimants are the ultimate losers: consolidations force defendants to pay exorbitant sums to settle cases involving no injury, thus inviting the filing of more unimpaired cases, thus causing another round of bankruptcies, and ultimately th[illegible] ensuring that cancer claimants are uncompensated.

The SAC does not believe that all consolidations of asbestos cases are unconstitutional. The West Virginia courts cannot be faulted for using innovative means to handle the tidal wave of pending asbestos claims. The Court should grant the petition for a writ of certiorari, however, because at some point – likely far short of a proceeding involving several thousand plaintiffs against 250 defendants – the case ceases to be a "trial" in any meaningful sense. As Judge Higginbotham put it over 12 years ago, in a much smaller asbestos consolidation, "[w]e are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not." *In re Fibreboard*

Corp., 893 F.2d 706, 712 (5th Cir. 1990). What it is, today in West Virginia, is simply a vehicle by which meritless cases are forced to settlement.

The Court should therefore take this opportunity to establish minimal standards for due process in consolidated proceedings in asbestos litigation. The SAC respectfully looks forward to giving the Court the benefit of the perspective of asbestos cancer claimants on the merits of this important issue.

CONCLUSION

For the above reasons, *amicus curiae* Unofficial Committee of Select Asbestos Claimants requests that the petition for writ of certiorari be granted.

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FOR THE DISTRICT OF DELAWARE

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Debtors.	)	

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Dated: October 1, 2001

* * *

mass of claims in an effective manner.[11] Since that report, the problem has only worsened. Indeed, the Supreme Court observed in 1999 that both the federal and state judicial systems were burdened by an "elephantine mass of asbestos cases" that "defies customary judicial administration." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 119 S. Ct. 2295, 2302 (1999).

A. Asbestos Claims Have Overwhelmed Both Federal and State Court Systems.

Untold tens of thousands of asbestos-related cases are now clogging state and federal courts.[12] As the Judicial Conference Committee observed, one of the "most objectionable aspects of asbestos litigation" is that "dockets in both federal and state courts continue to grow."[13] Prior to 1980, plaintiffs had filed approximately 950 asbestos cases in the federal district courts.[14] By 1985, 37,000 cases had

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[11] Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2 (Mar. 1991).

[12] *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. at 3 (1999) (statement of Professor Christopher Edley, Jr., Harvard Law School). *See also Asbestos Companies Report Numbers of Pending Claims, New Filings in 1998*, 14 Mealey's Litig. Rep.: Asbestos 23-27 (May 7, 1999) (reporting 196,300 cases pending against Owens-Corning alone as of September 30, 1998).

[13] Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991); *id.* at 7 ("The tide of asbestos personal injury and wrongful death litigation in federal and state courts in the 1970s and 1980s continues to rise unabated and has not begun to crest."). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (quoting the Judicial Conference Report).

[14] Terence Dungworth, *Product Liability and the Business Sector: Litigation Trends in Federal Courts* 36 (Rand Inst. 1988).

been filed, a four-fold increase in the filing rate over the preceding five-year period.[15] Since then, the filings have continued to grow. Between 1994 and 1999, new claims against major asbestos producers averaged approximately 40,000 per year.[16]

To channel the unrelenting tide, attempts were made to consolidate claims and resolve them on a collective basis within the tort system. The process of aggregation, however, had unintended results. Aggregation allows the grouping of so-called unimpaired claimants with the impaired, which gives the so-called unimpaired "sympathy by association" in front of a jury.[17] As a result, aggregation "makes it more likely that a defendant will be found liable and results in significantly higher damage awards."[18] Aggregation therefore has increased the pressure to settle claims brought by individuals who have suffered no injury or who do not currently have significant impairment.[19] As

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[15] Deborah R. Hensler, *Asbestos Litigation in the United States: A Brief Overview* 3 (Rand Inst. 1991) (computations based on the federal statistical data base).

[16] *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. at 4 (1999) (statement of Dean Paul Verkuil, Cardozo School of Law) ("[L]awsuits continue to arrive at a rate of over 40,000 per year, and over 200,000 cases are now pending."); *id.* ("The rate of new filings and the growing number of pending cases vividly demonstrate a basic fact – the asbestos litigation problem is not getting better, it is getting worse.").

[17] *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. at 6 (1999) (statement of Professor Christopher Edley, Jr., Harvard Law School).

[18] *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

[19] *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1888 (1992) (observing that mass consolidations "accentuate the likelihood of

(Continued on following page)

a result the unimpaired are often compensated on the same basis as the impaired because the tort system has encouraged the "parasitic fusion of strong and weak cases."[20]

At least in part as a result of the aggregation of large numbers of impaired and so-called unimpaired claims, the tort system has encouraged additional filings. By 1992, 60-70% of new claims were being filed by individuals who had a "marker" of asbestos exposure, pleural plaques, but who suffered no asbestos-related impairment.[21] As Justice

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compensating the unimpaired" while leading to "higher verdicts per case than in the absence of consolidation" and "higher settlement values").

[20] John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 1010 (1995). See also Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1974 (1992) ("Cases with minor injuries, or no current impairment at all, are producing payments for some individuals while other individuals, with serious impairment or fatal illness, are unable to obtain timely compensation."); *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. at 6 (1999) (statement of Professor Christopher Edley, Jr., Harvard Law School) (pointing to the jury award in *Cimino v. Raymark Industries*, 151 F.3d 297 (5th Cir. 1998), in which individuals with pleural plaques or "freckles" were award [sic] $558,900 and a mass consolidation in Mississippi in which unimpaired plaintiffs were awarded between $2 and $3.5 million as evidence that consolidation leads to the undesirable result of overcompensation of unimpaired plaintiffs at the expense of truly impaired plaintiffs).

[21] Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1853 (1992). Compounding the problem is the fact that pleural plaques are often misdiagnosed. *Id.* at 1852-53 ("Not infrequently the diagnosis of pleural plaque is erroneous."), citing Howard Frumkin, *et al., Radiologic Detection of Pleural Thickening*, 142 *Am. Rev. Respiratory Dis.*, 1325 (1990). *See also* Francis E. McGovern, *Resolving Mature Mass Tort*

(Continued on following page)

Breyer observed, "'up to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though a statistical majority of the individual litigants will never become impaired.'"[22]

In addition, mass screening programs have fostered huge numbers of claims by those who are unimpaired.[23] As

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Litigation, 69 B.U. L. Rev. 659, 674 (1989) ("Significant variances also existed in the parties' medical data. For example, the defendants' medical experts had generally found that many plaintiffs suffered only from pleural plaques or thickening of pulmonary membranes through their analysis of radiographic evidence. Plaintiffs' doctors, however, often found interstitial fibrosis, a much more serious and advanced condition, from similar evidence.").

[22] Richard Doll & Julian Peto, *Asbestos: Effects on Health of Exposure to Asbestos* 2 (1985). *See also In re Asbestos Prods. Liab. Litig. (No. VI)*, No. Civ. A. No. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996) ("Only a very small percentage of the cases filed have serious asbestos-related afflictions," and as a result they "are prone to be lost in the shuffle with pleural and other non-malignancy cases.").

[23] *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 102d Cong., 1st & 2d Sess. 77, 100 (Oct. 24, 1991) (testimony of Professor Lester Brickman) ("[P]leural plaque claims account for approximately 80% of new asbestos claim filings and represent a substantial percentage of previously filed claims. The existence of tens of thousands of such claims is accounted for by mass screenings of industrial workers financed by plaintiffs' lawyers and usually done with the active assistance of local union officials. Often, mobile x-ray vans brought to plant sites are used for the screenings."); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Policy 541, 564 (1992) ("Another probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs' lawyers who engage in aggressive claim-solicitation campaigns on a mass basis designed to multiply the number

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Judge Weinstein observed when presiding over the Johns-Manville bankruptcy: some plaintiffs' attorneys "have filed all of their cases without regard to the extent of injury."[24] Even a prominent asbestos plaintiffs' attorney acknowledged in the early 1990s that: "[t]here are gross abuses of our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent – we have untrammeled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong [and] should be stopped."[25]

Many individuals file claims, despite their lack of impairment, based solely on the fear of future disease or to avoid statutes of limitation. As Dr. Louis Sullivan, the former Secretary of the Department of Health and Human Services, recently testified before Congress, there are "mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are

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of filed cases, thereby increasing the pressure on defendants to settle cases wholesale.").

[24] *See also Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result form mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed. Moreover, many diagnoses are made by physicians not well schooled in the American Thoracic Society's criteria for the diagnosis of asbestosis, and the medical literature does not provide standards for judging the diagnosability of asbestos-related disease.").

[25] *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States 15 (Oct. 31, 1991) (remarks of Ronald L. Motley).

compelled to file for remedial compensation simply because of state statutes of limitation."[26]

Finally, large numbers of claims are generated based on questionable diagnostic techniques. Thus, for instance, the late Judge Carl Rubin appointed his own medical experts to evaluate claimants in 65 pending asbestos cases. Although all the plaintiffs claimed some asbestos-related condition, the court-appointed experts found that in fact only 15% had asbestosis, 20% had pleural plaques, and 65% had no asbestos-related condition whatsoever.[27]

In another example, a United States district judge in Kansas found that medical screeners departed from accepted medical standards by diagnosing asbestos-related "injuries" that failed to meet minimum American Thoracic Society diagnostic criteria. As a result the court concluded that "many, if not most" of the cases were "without merit." Overall, the court found that screening programs in the *Raymark* case produced a "steady flow of faulty claims." *See Raymark Indus., Inc. v. Stemple*, 1990 WL 72588, at *2, *8, *19, *29 (D. Kan. 1990); *see also In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1566 (D. Haw. 1990)

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[26] *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. at 4 (1999) (statement of Louis W. Sullivan, M.D., Immediate Past Secretary, Department of Health and Human Services). *See also* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 1011 (1995) ("[P]erhaps anticipating the impact of statutes of limitation and the single judgment rule on [asbestos] claims should harm materialize in the future, or perhaps bewitched by the idea of recovery for the mere fear of future illness, courts left the gate open and the caseloads surged.").

[27] Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991).

(cases are often diagnosed based on "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings).

In summary, despite the fact that any meaningful workplace exposure to asbestos long ago ceased, the flow of cases continues unabated. The "sheer number of asbestos cases" has led to several "distort[ions of] the traditional process" for resolving tort claims.[28]

B. The Bankruptcy System Is the Only Available Means for the Rational Adjudication and Resolution of the Asbestos Claims.

Judges and attorneys have proposed collective settlement of asbestos claims within the tort system, using class-action mechanisms. These approaches, however, have not survived appellate review. As discussed below, in two recent cases the Supreme Court blocked class-action settlements. Similarly, while a number of proposals for legislative solutions have

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[28] Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Judicial Conference of the United States 23 (Feb. 25, 1999).

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MOBIL CORPORATION AND
HONEYWELL INTERNATIONAL INC.,

Petitioners,

v.

BRUCE W. ADKINS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF 3M COMPANY AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION OF 3M COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the 3M Company ("3M"), formerly known as Minnesota Mining & Manufacturing Company, moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners. Like petitioners, 3M has been named as a defendant in the mass asbestos tort litigation in the West Virginia state courts that is the subject of the petition. 3M did not join in petitioners' request for relief from the West Virginia Supreme Court because, at the time petitioners sought relief, the trial court had not ruled that 3M would be grouped together with other defendants in the mass trial proceeding on "common issues." After the decision below, however, the trial court determined that 3M would be included in a "common issues" trial, and on August 12, 2002,

the court directed that 3M would be part of a group trial, together with manufacturers and distributors of asbestos-containing products, commencing six weeks later on September 23, 2002. Thus, 3M has a strong interest in ensuring that the state trial proceedings are conducted fairly and with proper regard for the parties' due process rights.

Petitioners have consented to the filing of all *amicus curiae* briefs submitted to assist the Court in its consideration of the petition, and have filed a written consent with the Court so stating. Respondents represented by Ness, Motley, P.A. have refused to consent to the filing of any *amicus curiae* briefs, and have filed a written refusal with the Court so stating. 3M accordingly seeks leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

REASONS WHY THE WRIT SHOULD BE GRANTED 2

I. The Treatment of Claims Against 3M Further Demonstrates the Due Process Violations Perpetrated by West Virginia's Mass Trial Procedure. 2

II. Punitive Damages Exacerbate the Due Process Violation Caused by Applying West Virginia Law to Claims Having No Connection to that State. 11

III. This Court Should Review the Mass Trial Decision Now. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Addair v. Huffman, 195 S.E.2d 739 (W. Va. 1973) 18
Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 12
BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 14, 17
Blair v. Equifax Check Services, Inc.,
181 F.3d 832 (7th Cir. 1999) 17
Buckeye Union Ins. Co. v. New England Ins. Co., 720
N.E.2d 495 (Ohio 1999) 13
Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 16, 17, 18
Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 14
Detroit & Mackinac Railway Co. v. Michigan R.R.
Commission, 240 U.S. 564 (1916) 15
Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W.
Va. 1992) 13
Gwathmey v. United States, 215 F.2d 148 (5th Cir.
1954) 7
Hardaway Management Co. v. Southerland, 977
S.W.2d 910 (Ky. 1998) 13
Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) 5, 6
In re Bridgestone/Firestone, Inc., Tires Products
Liab. Litig., 288 F.3d 1012 (7th Cir. 2002) 16, 17
In re Dow Corning Corp., 86 F.3d 482 (6th Cir.
1996) 16
In re Pan Am Corp., 16 F.3d 513 (2d Cir. 1994) 16
In re Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) 16, 17
Jenkins v. Raymark Indus., Inc.,
782 F.2d 468 (5th Cir. 1986) 12

Lindsey v. Normet, 405 U.S. 56 (1972) 9
Mayer v. Frobe, 22 S.E. 58 (W. Va. 1895) 18
Michigan Central R.R. v. Mix, 278 U.S. 492 (1929) 15
Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 6
Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992) 13
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 14
Painter v. Raines Lincoln Mercury, Inc., 323 S.E.2d 596 (W. Va. 1984) 18
Phillip Morris, Inc. v. Angeletti, 752 A.2d 200 (Md. 2000) 12
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) .. 13, 17
Scott v. Jenkins, 690 A.2d 1000 (Md. 1997) 13
SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702 (Pa. 1991) 13
Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425 (Tex. 2000) 12
State ex rel. Allman v. MacQueen, 551 S.E.2d 369 (W. Va. 2001) 6, 8
State ex rel. Cherry v. Burns, 602 N.W.2d 477 (Neb. 1999) 13
Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994) 12
TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993) 13
United States v. Armour & Co., 402 U.S. 673 (1971) 9
United States v. Central Supply Ass'n, 6 F.R.D. 526 (N.D. Ohio 1947) 7
Wright v. Everett, 90 S.E.2d 855 (Va. 1956) 13

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 1257 15
28 U.S.C. § 1292 16
29 C.F.R. § 1910.93a(c)(2) (1972) 3

30 C.F.R. part 11 (1972) 3
Fed. R. Civ. P. 15 6
Fed. R. Civ. P. 20 8
Fed. R. Civ. P. 21 8
Fed. R. Civ. P. 23 16
Fed. R. Civ. P. 42 8
Ky. Rev. Stat. Ann. § 411.186 12
N.C. Gen. Stat. Ann. § 1D-5 13
N.C. Gen. Stat. Ann. § 1D-30 12
Va. Code Ann. § 8.01-38.1 13

MISCELLANEOUS

Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. Rev. 527 (2002) 16
Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580 (1952) 7

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BRIEF OF 3M COMPANY AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*

3M Company ("3M") is a defendant in the mass asbestos trial underlying the writ proceeding in the West Virginia Supreme Court of Appeals that is the subject of the petition for certiorari.[1] 3M has been sued in the West Virginia asbestos cases not as a manufacturer or distributor

[1] Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than 3M, made a monetary contribution to the preparation or submission of the brief.

of asbestos containing products, or as a premises owner or an employer, but instead as a manufacturer of respiratory protection products that contained no asbestos. 3M submits this brief as *amicus curiae* because, as explained below, it was not included in the mass trial at the time the West Virginia Supreme Court of Appeals heard Mobil Corporation's petition for a writ of mandamus or prohibition. 3M, therefore, was not a party to the Mobil writ proceeding. On May 6, 2002, after the decision below by the West Virginia Supreme Court of Appeals, the trial court issued a ruling that the claims against 3M would be included in the mass trial scheduled for September 23, 2002. 3M thus has a strong interest in whether the mass trial complies with the requirements of due process.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE TREATMENT OF CLAIMS AGAINST 3M FURTHER DEMONSTRATES THE DUE PROCESS VIOLATIONS PERPETRATED BY WEST VIRGINIA'S MASS TRIAL PROCEDURE.

The underlying asbestos mass trial proceeding involves claims by thousands of plaintiffs.[2] The claims collectively include hundreds of different asbestos-containing products which allegedly were used at hundreds of employment sites located in many different States. With the exception of 3M, plaintiffs have sued companies they allege (a) manufactured, supplied, distributed or installed products containing asbestos; (b) are liable under a premises liability

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[2] No one knows exactly which cases are involved in the mass trial proceeding scheduled for September 23, 2002. Parties have estimated that the mass trial may involve as many as 10,000 cases, and approximately 2,000 cases against 3M are included.

theory based on the presence of asbestos at their facilities; and/or (c) are liable as an employer based on the plaintiff's exposure to asbestos during his or her employment.

Unlike the other defendants, 3M was sued over respiratory protection products. Plaintiffs allege that two 3M products are at issue, a respirator known as the Model 8710 and a nuisance dust mask known as the Model 8500. These two products are entirely different in terms of materials, design, purpose, and use. However, neither product contained any asbestos.[3]

The subject of Mobil's writ proceeding and the decision below is the trial court order requiring a mass trial, which was entered on February 26, 2002 (the "Trial Scheduling Order"). The Trial Scheduling Order requires three "Phase I" trials of supposed "common issues" to

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[3] 3M's Model 8710 respirator was designed to reduce (not eliminate) a user's exposure to airborne asbestos. It was certified by the National Institute of Occupational Safety and Health ("NIOSH") for that purpose in 1972. *See* 30 C.F.R. part 11 (1972). The Model 8710 respirator was a member of one class of respirators that federal regulations under the Occupational Safety and Health Act required to be used starting in the early 1970s in certain workplace environments, where specified levels of airborne asbestos were present, to reduce exposure levels below those prescribed by the Occupational Safety and Health Administration ("OSHA"). *See* 29 C.F.R. § 1910.93a(c)(2) (1972). Under the OSHA scheme, different classes or types of respirators were required based on increasing levels of airborne asbestos in a workplace.

The Model 8500 nuisance dust mask, in contrast, was not designed for use around asbestos. Instead, it was designed only to provide some level of filtering for non-toxic, nuisance dusts. After the OSHA respiratory protection regulations were promulgated in 1971, use of Model 8500 nuisance dust masks to reduce exposure to asbestos in a workplace not only would have been contrary to the design and purpose of the product, but also contrary to the federal regulations governing OSHA regulated workplaces.

determine "fault" (as to products, whether they were "defective"). These Phase I trials divide defendants into three groups: (1) asbestos containing product manufacturers and distributors, (2) premises liability defendants, and (3) employer defendants, with the "fault" of the defendants in each group tried to separate juries. The Trial Scheduling Order also contemplates later "Phase II" trials to new juries, to decide causation and damages issues for individual plaintiffs. Under the Trial Scheduling Order, the new juries for the Phase II proceedings will receive instructions specifying the Phase I jury's verdict as to each defendant in each Phase II trial.

Given the unique nature of the claims against 3M and its respiratory protection products, the Trial Scheduling Order did not include those claims in the Phase I "common issues" trials. 3M subsequently asked the trial court to clarify 3M's status, and particularly to clarify that all issues as to 3M would be tried in the Phase II trials. Instead, however, the trial court announced on May 6, 2002 (a few days after the West Virginia Supreme Court of Appeals' decision on Mobil's writ petition) that 3M would be included in a Phase I trial. The court did not at that time identify any "common issues" as to 3M that could be tried, nor did it say whether the 3M mask and respirator claims would be included in one of the existing trial groups (*i.e.*, asbestos containing products, premises owners, employers) or in a separate trial group for respiratory protection products.

Because 3M believes that the mask and respirator claims do not involve any "common issues" that can be decided in a bifurcated proceeding by one jury and used by a different jury to determine liability, 3M asked the trial court to specify the questions that would be presented to the jury. Because 3M believes there are no common issues as between the claims against 3M and those against manufacturers and distributors of asbestos containing products, premises owners, or employers, 3M also asked the trial court to place

3M in its own (respiratory protection products) Phase I trial group. 3M did not receive a definitive answer from the trial court until August 12, 2002 – 42 days before the mass trial is scheduled to begin.

At the August 12, 2002 hearing the trial court ruled that the claims involving 3M's masks and respirators would not be tried to a separate Phase I jury, but rather to the same jury as the claims against manufacturers and distributors of asbestos containing products. Thus, claims against 3M's non-asbestos containing respiratory protection products will be tried in a supposed "common issues" trial not with other respiratory protection products, but instead with hundreds of asbestos containing products – products which are themselves of dramatically different types. As demonstrated by the petition and other briefs supporting the petition, the sheer number of products and defendants and the mass of evidence the jury will have to assimilate for hundreds of different asbestos containing products over more than thirty years in order to make product defect and time period determinations (as well as punitive damages determinations) for each product are simply staggering. Now, in the context of that same mass trial of hundreds of asbestos containing products, 3M must defend its Model 8710 respirator and Model 8500 nuisance dust mask – products which do not contain asbestos and which are themselves entirely different products from each other.

This Court laid out a basic framework for due process analysis in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994). Where traditional common-law procedures "provide[] protection against arbitrary and inaccurate adjudication," a State's abrogation of that protection "raises a presumption that its procedures violate the Due Process Clause." *Id.* at 430. The presumption is overcome only where (1) the State provides a reasonably adequate "substitute for the protection provided by" the traditional procedure, or (2) social or other changes have made the

procedural protection unnecessary. *Id.* at 431. Employing that analysis, *Oberg* held that Oregon violated the Due Process Clause by abrogating judicial review of punitive damages awards for excessiveness. *Id.* at 432-35; *see also id.* at 435-36 (Scalia, J., concurring); *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 & n.1 (2000) (while Fed. R. Civ. P. 15 is not "itself a constitutional requirement," a party "cannot, consistently with due process," be deprived of the core procedural protections provided by that Rule).

The decision below upholds the aggregation and joint trial of thousands of unrelated claims against well over 100 defendants and several hundred products (the exact numbers being presently unknown) and does so regardless of jury confusion and other prejudice. This novel procedure, which the West Virginia Supreme Court of Appeals calls "conjoin[der]" (Pet. App. 10a, 13a) and holds is authorized by its new Trial Court Rule 26.01, is an elementary violation of the *Oberg* test. It abrogates traditional procedural safeguards limiting the aggregation of parties and claims as necessary to permit rational decisionmaking by the jury, and it provides no substitute protection of any kind.[4] Nor is there any question about the continuing need for the procedural

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[4] Any implication in the decision below that "the existence of common factual and/or legal issues" permitting these thousands of cases to "be grouped together for trial purposes" was determined at the time the cases were referred to the state Mass Litigation Panel, *see* Pet. App. 13a, is unfounded. The referral order (issued by a single justice) noted the lack of "specific litigation plans for the variety of cases that have been consolidated in this referral," and ordered a procedure "to develop specific rules and strategies to deal with the disposition of these cases." Administrative Order Re Mot. to Refer Asbestos Litig. to the Mass Litig. Panel 2, 3-4 (W. Va. Nov. 17, 2000) (Maynard, C.J.) ("Referral Order"). The West Virginia Supreme Court of Appeals itself said in its first decision after the Referral Order that "no decision has been reached as to whether mass trials will be held or not." *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 373 (W. Va. 2001).

protection against confusion and prejudice. To the contrary, that protection is even more sorely needed at this advanced stage of the asbestos litigation saga, where many plaintiffs' counsel in their quest for still-solvent companies assert claims against ever more peripheral parties.

Under the procedural systems that evolved during the last century, it is commonplace "that it is desirable to include as many claims and parties as there are in one suit, *except where this may make the suit too many-sided and complicated for the jury to unravel, or where this free joinder may cause prejudice to some party or claim.*" Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 581 (1952) (emphasis added).[5] Thus, all of the basic aggregation devices under the Federal Rules of Civil Procedure – joinder of claims and parties, class actions, and consolidation of actions – contain procedural protections against the confusion and prejudice that would result from an unfettered use of these devices. For example, joinder of parties is limited by requiring both

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[5] *See, e.g., Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (joint trial of condemnation actions involving valuation of 236 tracts of land with many owners violated due process; "the very size of the case as tried, without the additional complexities, was such that the jury must have been overwhelmed. In fact, during the trial there [were] so many tracts and so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times."); *United States v. Central Supply Ass'n*, 6 F.R.D. 526, 534 (N.D. Ohio 1947) (granting judgments of acquittal at close of prosecution's case after three and a half months of trial in a criminal case involving 76 defendants; "To believe that an ordinary jury could hold in mind the names and identities of all the defendants and segregate and classify all the different bits of evidence, requires a faith and confidence in the human intellect which experience does not support. Faith that the verdict in such a case would be rational and fair, would have to be based on a blind trust in ritual contrary to all experience of possibilities."). The *Central Supply* court's dramatic description of the trial in that case, *see* 6 F.R.D. at 533-34, pales in comparison to the mass trial the West Virginia courts have ordered.

claims arising out of the same transaction or occurrence (or series thereof) and a question of law or fact common to all persons joined. Fed. R. Civ. P. 20(a). Issues of confusion and prejudice resulting from joinder of claims and parties are further addressed by giving trial courts broad authority to order (1) severance of parties and claims, and (2) separate trials of claims and issues. Fed. R. Civ. P. 20(b), 21, 42(b).

The same cannot be said for West Virginia's "conjoinder" procedure. That mass trial procedure permits the aggregation and joint trial of thousands of claims against hundreds of products and many scores of defendants, and does so without even the most cursory scrutiny of the dangers of confusion and prejudice. Such matters are not a subject of inquiry. *See* Pet. App. at 9a-13a. As the decision below reiterates, "because the provisions of TCR 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting the various rules of civil procedure, including Rules 20, 23, or 42, which respectively address issues of joinder, class action, and consolidation." Pet. App. 4a (quoting *Allman*, 551 S.E.2d at 374). As a consequence, no analysis or even mention of issues of prejudice and confusion was made when, after the decision below, the trial court tossed the claims against 3M's respiratory protection products into the Phase I mass trial of claims against hundreds of different asbestos-containing products. Nor did the court identify any true "common issue" as between these respiratory protection products and the asbestos containing products.

Other due process violations, not directly raised by Mobil's petition, arise from the mass trial treatment of claims against 3M. For example, the trial court (as well as the West Virginia Supreme Court of Appeals in denying Mobil's writ petition) has never explained when and how defendants will be able to try affirmative and other defenses. West Virginia law also provides for a comparative fault defense, but the court has not explained how a defendant will have a

meaningful opportunity to litigate this defense. The Phase I jury will not hear evidence about individual plaintiffs or their conduct. The Phase II jury will not hear "fault" evidence about defendants (evidence required to make a meaningful comparison to evidence about the plaintiff's fault) unless the evidence presented in the Phase I trial is presented again to each Phase II jury, which would defeat entirely the ostensible purpose of the Phase I mass trial.

More generally, the trial court never has explained how this two-phase trial can be conducted, consistent with due process, as to the claims against 3M without presenting in Phase II all of the evidence presented in Phase I. If the Phase II jury is only instructed that the Phase I jury found a respiratory protection product was "defective," the plaintiffs would be relieved of proving an essential element of their claims in the individual Phase II trials – *i.e.*, that the aspect of the product the Phase I jury found defective was the cause of an individual plaintiff's harm. Likewise, 3M would be precluded from establishing a defense that the defect did not cause the plaintiff any injury in the circumstances of the plaintiff's use of the product. Furthermore, any instruction that a product has been found "defective," even if it could describe the reasons for the defect finding, would be enormously prejudicial in a Phase II trial.

The "right to litigate the issues raised" and present defenses are basic "right[s] guaranteed . . . by the Due Process Clause" of the Fourteenth Amendment to the United States Constitution. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *see also, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense") (citation omitted). The mass trial procedures contain no explanation how these due process rights can, or will, be protected, particularly for respiratory protection products.

This treatment of the claims against 3M further shows that West Virginia asbestos litigation is an abyss, with procedures so flawed and unfair that hundreds of defendants will have little practical choice but to settle with thousands of plaintiffs – most of whom likely are not impaired and never used or were injured by the particular defendant's products.[6] For the sake of a large segment of the Nation's economy, jobs, and retirement accounts, this Court should grant review and enforce basic federal constitutional limits on the West Virginia judicial system.

As Justice Maynard pointed out in his separate opinion below, the procedures fashioned by the West Virginia courts have operated as a magnet, attracting many non-West Virginia plaintiffs who "have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." Pet. App. 21a. The result is a vicious cycle in which the adoption of unfair mass trial procedures generates the filing of still more claims, leading to further efforts to deny the defendants' rights to due process.

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[6] One of the features of the West Virginia asbestos mass trial proceeding is that the defendants have not been allowed to conduct discovery as to individual plaintiffs, and the plaintiffs have not been required to provide meaningful disclosure as to the product(s) they actually used or to which they were exposed. Accordingly, 3M has been precluded from learning which of the nearly 2,000 plaintiffs asserting claims against it actually used a 3M product, the product that allegedly was used, and where and when it was used.

II. PUNITIVE DAMAGES EXACERBATE THE DUE PROCESS VIOLATION CAUSED BY APPLYING WEST VIRGINIA LAW TO CLAIMS HAVING NO CONNECTION TO THAT STATE.

The petition presents, as a second issue, the due process violation that results from applying West Virginia law to claims that have no contacts with West Virginia. As Justice Maynard also noted, the mass trial includes the claims of thousands of plaintiffs who "are not West Virginia residents and were never exposed to asbestos in this state." Pet. App. 21a. At the August 12, 2002 hearing, the trial court confirmed that West Virginia law will be applied to the claims of all plaintiffs, including those who neither lived nor worked in West Virginia and had no other connections to the State. The court stated: "We understand the argument made regarding the choice of law. We understand that there may be Plaintiffs that absolutely have no nexus whatsoever . . . . But . . . we are going to apply West Virginia law in all aspects of the first phase of this trial." 8/12/02 Hearing Tr. 172.

The trial court also ruled at the August 12 hearing that the Phase I trials will include a punitive damages finding and use of a "punitive damages multiplier." Under this procedure, the Phase I jury will determine whether each defendant is responsible for punitive damages and, if so, a number by which the Phase II jury's compensatory damages award will be "multiplied" to determine the amount of punitive damages. The Phase I jury will make its findings on punitive damages and fix the multiplier without evidence of any plaintiff's injury, the amount of the compensatory damages awarded to any plaintiff (or in total), or the circumstances of any plaintiff's product use.

As discussed below, these rulings rachet up the pressure to settle on any company named as a defendant in

these cases. In combination, these two rulings also magnify the due process violation perpetrated by the mass trial proceeding.

With respect to choice of law and the punitive damages multiplier specifically, to our knowledge, no appellate court of any other State has permitted use of that procedure. Maryland's highest court has rejected its use under Maryland substantive law. *See Phillip Morris, Inc. v. Angeletti*, 752 A.2d 200, 249 (Md. 2000). Use of the punitive damages multiplier is also illegal under Texas law, which forbids any determination of punitive damages liability until compensatory damages are established. *See Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 432-39 (Tex. 2000). The multiplier procedure also violates the laws of Kentucky and North Carolina, which require that compensatory damages be tried first, and/or that the same jury decide both compensatory and punitive damages. *See* Ky. Rev. Stat. Ann. § 411.186; N.C. Gen. Stat. Ann. § 1D-30; *see also Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 & n.28 (Tex. 1994) (discussing similar statutes in 13 other States).[7]

More generally and quite apart from use of the multiplier, there are major differences among States' punitive damages laws. Not the least of these differences is the very conduct required for the imposition of any punitive award. For example, although "gross negligence" is sufficient to

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[7] The leading authority supporting use of a punitive damages multiplier was *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986), which held it permissible under Texas substantive law (the governing law in *Jenkins*). *Id.* at 474. The Texas Supreme Court's decision in *Southwestern Refining* shows that *Jenkins*' view of Texas law was incorrect. 22 S.W.3d at 432-33. The Fifth Circuit itself rejected (under federal law) a similar procedure that would allow punitive damages liability to be determined before compensatory damages. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998).

support punitive damages under West Virginia law,[8] the laws of many States – among them Pennsylvania, Virginia, Maryland, and North Carolina – do *not* allow punitive damages to be awarded for conduct that is only grossly negligent.[9] Similarly, West Virginia does not require proof of actual malice for punitive damages,[10] while other States such as Maryland and Ohio do.[11] Other significant differences in state laws regarding punitive damages range from total prohibition[12] and damage caps[13] to the relevance and admissibility of financial condition evidence.[14] In short, there are multiple levels of significant conflict among state punitive damages laws relevant to the claims involved in the mass trial here.

Accordingly, West Virginia's insistence on applying its law to the claims of plaintiffs having no connection to that State violates due process in more ways than one. As to punitive damages, that use of West Virginia's law conflicts not only with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797

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[8] *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 877-87 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

[9] *See, e.g., Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 652 (Md. 1992); *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 705 (Pa. 1991); *Wright v. Everett*, 90 S.E.2d 855, 858 (Va. 1956); N.C. Gen. Stat. Ann. § 1D-5(7).

[10] *TXO*, 419 S.E.2d at 887.

[11] *Scott v. Jenkins*, 690 A.2d 1000, 1003-04 (Md. 1997); *Buckeye Union Ins. Co. v. New England Ins. Co.*, 720 N.E.2d 495, 501 (Ohio 1999).

[12] *See, e.g., State ex rel. Cherry v. Burns*, 602 N.W.2d 477, 484 (Neb. 1999).

[13] *See, e.g.*, Va. Code Ann. § 8.01-38.1.

[14] *Compare Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1992) ("relevant"), *with Hardaway Management Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998) ("may not present evidence or otherwise advise the jury").

(1985), but also with this Court's decision that a State may not apply its punitive damages law to punish conduct that was lawful in the State where it occurred. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 570-73 (1996).[15]

The punitive damages multiplier also independently violates the Due Process Clause. Under that procedure, the jury that determines punitive damages liability and sets the multiplier does so without knowing the actual harm that a defendant's conduct caused to any individual plaintiff, or collectively to all plaintiffs. This violates the requirement that the reasonableness of a punitive award be evaluated in the light of actual harm caused by the defendant's conduct. *See Gore*, 517 U.S. at 580-81; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440-41 (2001).

Even more fundamentally, the punitive damages multiplier violates due process in that neither the amount of punitive damages appropriate in any case nor its impact on the defendant is ever determined by any jury. Under the procedure, no jury ever decides the amount of a punitive award. Rather, one jury sets an abstract multiplier, another determines the compensatory award and someone mechanically does the math. The result is that no jury ever decides whether the amount of punitive damages assessed against the defendant – either as to the individual plaintiff or collectively – is necessary for punishment and deterrence. This approach radically departs from the traditional procedure for assessing punitive damages, and from the traditional justifications for imposing such damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

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[15] In *Gore*, this Court also noted (without deciding) the issue "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State." 517 U.S. at 573 n.20 (emphasis in original).

III. THIS COURT SHOULD REVIEW THE MASS TRIAL DECISION NOW.

The decision below unquestionably is a "final judgment[] or decree[]" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a). Under this Court's longstanding precedents, a decision by a state supreme court granting or denying a writ of mandamus or prohibition is a "final" decision within the meaning of § 1257(a) and predecessor statutes. Pet. 27; *Michigan Central R.R. v. Mix*, 278 U.S. 492, 494 (1929) ("The application for the writ of prohibition was denied [by the Supreme Court of Missouri] without an opinion. That judgment is final within the meaning of § 237(a) of the Judicial Code.").[16]

It is appropriate and important that this Court grant review at this point in the underlying mass trial litigation. As petitioners argue, abusive aggregations of tort claims present Armageddon scenarios, in which defendants may be – indeed, are intended to be – effectively compelled to settle non-meritorious and marginal claims. If the tactic is

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[16] *See also, e.g., Detroit & Mackinac Ry. Co. v. Michigan R.R. Comm'n*, 240 U.S. 564, 570-71 (1916):

> Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of § 237, Judicial Code, upon which our power to review depends, because the judgment does not determine the merits and end the litigation. But, as this court has said, "all judgments and decrees which determine the particular cause" are final in the sense of the statute. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of statute.

successful, as it typically has been in the absence of pre-trial appellate review, the result is to avoid appellate review altogether. Federal courts of appeals have become increasingly aware of this evolving mass litigation phenomenon, and therefore increasingly willing to grant interlocutory review before the irreparable harm occurs and appellate review is evaded. *See, e.g., In re Bridgestone/Firestone, Inc., Tires Products Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) (Easterbrook, J.) (interlocutory review under Fed. R. Civ. P. 23(f)); *In re Dow Corning Corp.*, 86 F.3d 482, 487-88 (6th Cir. 1996) (collateral order doctrine); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (interlocutory review under 28 U.S.C. § 1292(b)); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, C.J.) (mandamus); *In re Pan Am Corp.*, 16 F.3d 513 (2d Cir. 1994) (collateral order doctrine); *see also* Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. Rev. 527, 554-84 (2002).

Rhone-Poulenc involved a situation similar to this one, with an unlawful aggregation of claims, 51 F.3d at 1302-04, and use of a single negligence standard rather than the actual tort law of the 50 States, *id.* at 1300-02. Ruling that pre-trial review by writ of mandamus was appropriate and necessary, Chief Judge Posner reasoned that:

> It is true that [the first phase of the bifurcated trial] would only be prima facie liability, [and] that the defendants would have various defenses [to assert in later proceedings]. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. If they settle, the class

> certification – the ruling that will have forced them to settle – will never be reviewed. Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements."

51 F.3d at 1298 (citations omitted).[17] The blackmail threat is no less real in this mass asbestos litigation.

Manipulation of choice of law rules and illegal use of a single law to govern multi-state claims is a device frequently employed in coercing "blackmail settlements." *See Bridgestone/Firestone*, 288 F.3d at 1016-18; *Rhone-Poulenc*, 51 F.3d at 1300-01; *cf. Castano*, 84 F.3d at 741-44. Here, the West Virginia courts are racheting the pressure created by that device still further, applying West Virginia's punitive damages law and a "multiplier" to all plaintiffs and claims in contravention of this Court's holdings in *Gore* as well as *Shutts*.[18] Unlike *Bridgestone/Firestone, Rhone*

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[17] *See also Bridgestone/Firestone*, 288 F.3d at 1015-16 ("[a]ggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims"); *Castano*, 84 F.3d at 746 ("Class certification magnifies and strengthens the number of unmeritorious claims. . . . In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle . . . . These settlements have been referred to as judicial blackmail."); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (noting that "empirical studies" support the view that class actions are commonly used "to wring settlements from defendants whose legal positions are justified but unpopular").

[18] In truth, the West Virginia courts are not even applying normal West Virginia law, but rather a special punitive damages law crafted solely for mass trials. For example, under normal West Virginia law, the jury must consider whether any punitive damages are necessary in light of the (...continued)

Poulenc and *Castano*, however, this mass litigation is in state rather than federal court. In this instance, this Court is the only federal appellate court able to vindicate the Supremacy Clause and due process guarantees of the federal Constitution. Particularly given that there is no "final judgment" jurisdictional issue, this Court should grant review and do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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amount of compensatory damages awarded. *See, e.g., Painter v. Raines Lincoln Mercury, Inc.*, 323 S.E.2d 596, 598-99 n.2 (W. Va. 1984); *Addair v. Huffman*, 195 S.E.2d 739, 743 (W. Va. 1973); *Mayer v. Frobe*, 22 S.E. 58, 63 (W. Va. 1895). The multiplier procedure makes this impossible, because the jury determines whether punitive damages should be awarded and a multiplier without knowing the amount of any compensatory award.

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Petitioners,

v.

BRUCE W. ADKINS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae the Association of American Railroads ("AAR") respectfully requests leave of this Court to file the following brief in the above captioned matter. In support of its motion, AAR states as follows:

1. The petitioners have granted their consent in writing to the filing of this brief. Petitioners' written consent has been previously filed with the Court. However, respondents have categorically denied consent to all *amici curiae*, thus necessitating this motion. Respondents' written objections have also been previously filed with the Court.

2. AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail

industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

3. The constitutionality of West Virginia's special mass litigation rule, Trial Court Rule 26.01, see Pet. App. 36a-39a, is a matter of substantial concern to the AAR because a number of railroads are subject under the rule to mass trials in the West Virginia courts. Norfolk Southern Railway, Co. ("Norfolk Southern"), CSX Transportation, Inc. ("CSX"), Consolidated Rail Corporation, and American Premier Underwriters, Inc. (formerly known as Penn Central Corporation) have been named as defendants in more than 5,592 asbestos cases brought in the West Virginia state courts under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60. See, *e.g.*, *Norfolk S. Ry.* v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238, slip op. at 2 (S.D.W. Va. Aug. 12, 1999) (Memorandum Order). Because special considerations apply to FELA claims, which arise under federal law, these railroads will not be part of the same mass trial groups as petitioners Mobil Corporation and Honeywell International, Inc., who have been sued under various state-law theories. Nevertheless, the West Virginia courts have lumped the railroad FELA cases into their own mass trial group under Rule 26.01. See *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 377 (W. Va. 2001) (per curiam) (using FELA cases as an example of the mass asbestos trial groups contemplated under Rule 26.01); *In re West Virginia Asbestos Personal Injury Litig.*, Civ. No. 01-C-9000, slip op. at 5 (W. Va. Cir. Ct. Kanawha County, Sep. 6, 2001) (Report of the Honorable Martin J. Gaughn) (report of the judge assigned to oversee the Rule 26.01's mass asbestos trials, stating that "it is anticipated that" trial in the railroad FELA cases "would begin on October 29, 2002."). Accordingly, the

railroads are equally subject to the unconstitutional prejudice arising out of the inherently unfair process of mass trials.

Since Rule 26.01 was adopted, the railroads have consistently challenged the rule's constitutionality (as both parties and amici) in the West Virginia state and federal courts. See, *e.g.*, *Norfolk S. Ry.* v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238, slip op. at 2.

4. AAR believes that its familiarity with the unique status of its members – who are defendants in the West Virginia state courts in asbestos cases arising under federal law – will aid in the Court's understanding of the issues presented in the Petition for Certiorari. In addition, railroad asbestos liability is governed by the FELA, and the AAR believes the Court should consider the special concerns that arise with application of Rule 26.01 to FELA claims.

Respectfully submitted,

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QUESTION PRESENTED

Because the cases pending in the West Virginia state courts against members of the Association of American Railroads arise under federal law, this brief's discussion is limited to the first question presented in the Petition for Certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
REASONS FOR GRANTING THE PETITION	1
I. MASS AGGREGATION OF CLAIMS IS CONTRARY TO THIS COURT'S DUE PROCESS AND FELA CASES	3
A. Mass Trials Without Inquiry Into Commonality Of Claims Or Possible Prejudice Is Unlawful	3
B. Certiorari Is Warranted Because Rule 26.01 Undermines The Jury's Ability To Make Informed And Rational Decisions In FELA Cases	10
1. Temporal And Physical Limitations On A Court's Ability To Hear Evidence	10
2. Human Inattention, Lack Of Comprehension And Forgetfulness	11
3. Evidentiary Spillover	11
II. IMMEDIATE REVIEW IS NECESSARY TO PREVENT FUNDAMENTALLY UNFAIR PROCEEDINGS AND SIGNIFICANT PREJUDICE TO THE APPELLATE PROCESS.	14
A. Immediate Review Is Warranted Because Rule 26.01's Mass Trial Procedure Is Structurally Flawed	14

TABLE OF CONTENTS – continued

Page

B. Rule 26.01 Has The Purpose And Effect Of Forcing Defendants To Unfairly Surrender Their Rights Without Trial 15

C. Rule 26.01 Extinguishes Meaningful Appellate Review 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

Amchen Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 6, 7, 8
American Ry. Express Co. v. *Levee*, 263 U.S. 19 (1923) 3
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 14
Baker v. *Watermann S.S. Corp.*, 11 F.R.D. 440 (S.D.N.Y. 1951) 12, 13
Baltimore & Ohio R.R. v. *Mosele*, 368 N.E.2d 88 (Ill. 1977) 4
Blankenship v. *General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991) 16
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 14
Bower v. *Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999) 16
Bradford v. *John A. Coleman Catholic High Sch.*, 488 N.Y.S.2d 105 (N.Y. App. Div. 1985) 13
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) 4
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 4, 9
Davis v. *Wechsler*, 263 U.S. 22 (1923) 3
Dice v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) 4
Felder v. *Casey*, 487 U.S. 131 (1988) 3
In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) 9
Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) 3, 4
Johnson v. *United States*, 520 U.S. 461 (1997) 14
Law v. *General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) 18
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 6

TABLE OF AUTHORITIES – continued

Page

Malcom v. *National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) 5
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 6
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 14, 15
Monessen Southwestern Ry. v. *Morgan*, 486 U.S. 330 (1988) 3, 5
Norfolk S. Ry. v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238 (S.D.W. Va. Aug. 12, 1999) 2
Norfolk & W. Ry. v. *Ayers*, No. 01-963 (U.S. granted Apr. 1, 2002) 8
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 6, 7, 14
In re Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993) 5
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 17
Smith v. *Murray*, 477 U.S. 527 (1986) 18
State ex rel. Allman v. *MacQueen*, 551 S.E.2d 369 (W. Va. 2001) 5
State ex rel. Appalachian Power Co. v. *MacQueen*, 479 S.E.2d 300 (W. Va. 1996) 15
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 14
Urie v. *Thompson*, 337 U.S. 163 (1949) 4
Waller v. *Georgia*, 467 U.S. 39 (1984) 14
In re West Virginia Asbestos Personal Injury Litig., Civ. No. 01-C-9000 (W. Va. Cir. Ct. Kanawha County, Sep. 6, 2001) 5

STATUTES

45 U.S.C. § 51 4
§§ 51-60 2

TABLE OF AUTHORITIES – continued

RULES Page

W. Va. R. App. P. 3 17
7 17

LEGISLATIVE HISTORY

H.R. Rep. No. 60-1386 (1908) 4

SCHOLARLY AUTHORITIES

Warren E. Burger, *Can Juries Cope with Multi-Month Trials?*, 3 Am. J. Trial Advoc. 449 (1980) 11
Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 17
Edith Greene & Elizabeth F. Loftus, *When Crimes are Joined at Trial*, 9 Law & Hum. Behav. 193 (1985) 12
Irwin A. Horowitz et al., *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. Applied Soc. Psychol. 444 (1980) 12
Irwin A. Horowitz et al., *Effects of Trial Complexity on Decision Making*, 81 J. Applied Psychol. 757 (1996) 12
Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. Applied Soc. Psychol. 453 (1982) 12

OTHER AUTHORITIES

Restatement (Third) of Torts: Apportionment of Liability (2000) 16
Lewis Carroll, *Alice in Wonderland* (1923) 18

TABLE OF AUTHORITIES – continued

Page

Special Comm. on Jury Comprehension, *Jury Comprehension in Complex Cases*, A.B.A. Sec. Litig. Rep. (Dec. 1989) 11

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BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The interests of the Association of American Railroads ("AAR") are set forth in the accompanying motion for leave to file as *amicus curiae*.

REASONS FOR GRANTING THE PETITION

Petitioners have made a compelling case that Rule 26.01 violates the fundamental tenets of the Due Process Clause and

[1] In accordance with Supreme Court Rule 37.6, *amicus* AAR states that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than AAR made any monetary contribution to its preparation or submission.

conflicts with the precedents of this Court and federal courts of appeals. The constitutional problems for defendants facing asbestos claims under state law alone justify a grant of certiorari, but there are also special concerns in the application of Rule 26.01 to the adjudication of federal claims pending against the railroads in West Virginia. Several of the nation's major railroads have been named as defendants in more than 5,592 asbestos cases brought in the West Virginia state courts under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60. See *Norfolk S. Ry.* v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238, slip op. at 2 (S.D.W. Va. Aug. 12, 1999) (Memorandum Order). These concerns raised by Rule 26.01's effect on these federal claims underscore the need for immediate review.

Regardless of the number of defendants, any mass aggregation of the claims of unrelated asbestos plaintiffs under Rule 26.01 is inherently prejudicial. That prejudice is exacerbated in the context of negligence claims for asbestos injury arising from an employer's failure to warn or protect the employee, where the defense often depends on plaintiff-specific facts and complex medical and scientific evidence. Even apart from the patent unconstitutionality of Rule 26.01, this Court's FELA jurisprudence prohibits the application of state law procedures that unduly burden federal rights and defenses.

Moreover, given that the order denying the writ of prohibition is final, Pet. 27, and that trials conducted under the basic parameters of Rule 26.01 are structurally flawed and inherently prejudicial, there is nothing to be gained from delaying review. Because of the procedural advantages for plaintiffs in West Virginia courts and the hospitality given to mass occupational-exposure complaints even prior to Rule 26.01, railroads have been long forced into expensive and often unwarranted settlements of claims brought in West Virginia. Under Rule 26.01, the settlement pressure to avoid trials in which jury consideration of the evidence is

compromised, and appellate rights effectively extinguished, will be immense. Lawyers representing unimpaired or minimally impaired plaintiffs have advocated these procedures, not for purposes of justice, but because they are inherently unfavorable to defendants and create extreme settlement leverage. Since West Virginia is fast becoming the preferred forum for asbestos-related FELA claims against the major Eastern railroads, the prejudice stemming from Rule 26.01 will have an unusually large impact on the nation's FELA cases unless this Court grants immediate review.

I. MASS AGGREGATION OF CLAIMS IS CONTRARY TO THIS COURT'S DUE PROCESS AND FELA CASES.

A. Mass Trials Without Inquiry Into Commonality Of Claims Or Possible Prejudice Is Unlawful.

Generally the Due Process Clause permits state courts to apply nondiscriminatory and reasonable state-law procedures in adjudicating federal claims. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). "By the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Id.* (quoting *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 296 (1949)). In fact, this Court has frequently intervened to prevent unreasonable local procedural rules from defeating the valid assertion of a federal right. See, *e.g.*, *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 336 (1988); *Felder*, 487 U.S. at 138-53; *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) (stating that, under the Supremacy Clause, state courts have a duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected").[2]

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[2] *See also Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (rejecting a state court rule that an appearance waived a railroad's venue defense under federal law); *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923) (holding that state rules regarding the burden of proof could not be applied

This Court's review is particularly appropriate in this case because thousands of the cases that are subject to Rule 26.01's mass trials are FELA claims. Enacted in 1908, FELA creates a federal cause of action in negligence for employees of interstate railroad carriers injured on the job: "[e]very common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier ... for ... injur[ies] ... resulting in whole or in part from the [carrier's] negligence." 45 U.S.C. § 51; *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 541-43 (1994). The elements of a FELA cause of action are informed by common-law principles "'as established and applied in the federal courts'" unless those principles are altered by FELA's express statutory provisions. *Urie* v. *Thompson*, 337 U.S. 163, 174, 182 (1949); *see also Gotshall*, 512 U.S. at 543-44.

This Court has exercised special vigilance to ensure that state procedural rules (which may be applied in FELA) do not undermine the federal right. H.R. Rep. No. 60-1386, at 3 (1908) (noting Congress' purpose in enacting FELA was to "create uniformity throughout the Union" with respect to the financial responsibility of railroads for injuries to their employees). In *Garrett* v. *Moore-McCormack Co.*, this Court said that FELA must have "a uniform application throughout the country unaffected by local views of common law rules" and that "[t]his uniformity requirement extends to the type of proof necessary for judgment." 317 U.S. at 244.[3] In

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to "narrow[] the protection that the defendant had secured" under a federal law limiting railroad liability).

[3] *See also Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) ("[T]he federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under [FELA]."); *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) (reversing a state court order that dismissed a FELA claim based on local pleading requirements because of the order's effect on national uniformity in FELA practice); *Baltimore & Ohio R.R.* v. *Mosele*, 368 N.E.2d 88, 96-97 (Ill. 1977).

accordance with this heightened focus on national uniformity, this Court has never hesitated to review state court rules that have attempted to streamline the state courts' dockets at the expense of FELA litigants. See, *e.g.*, *Monessen*, 486 U.S. at 336.

There can be no question that Rule 26.01 values efficiency over proper adjudication of FELA claims. Indeed, the West Virginia Supreme Court justified its action in promulgating and adopting Rule 26.01 by pointing to its perceived need to clean out the state courts' dockets. See *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 371 (W. Va. 2001) (per curiam). To accomplish this judicial housecleaning, Rule 26.01 omits any inquiry into the commonality of the facts and issues to be decided among the plaintiffs and defendants who are to be thrown together for a mass trial. Although such an inquiry has traditionally been required in class actions, consolidations and joinders to ensure that the parties are able to present a meaningful case in a multi-party proceeding,[4] the West Virginia Supreme Court held that such traditional due process concerns do not apply in Rule 26.01 mass trials. See *id.* at 374.

Importantly, Rule 26.01's omission of a commonality inquiry is not premised upon an assumed similarity among the throng of plaintiffs in the thousands of state and federal asbestos cases pending in West Virginia. To the contrary, it is the breathtaking variety and complexity of those cases – the factual differences relating to the parties, their injuries, legal theories, and damages – that caused the West Virginia courts to throw in the towel. See *In re West Virginia Asbestos Personal Injury Litig.*, Civ. No. 01-C-9000, slip op. at 2 (W.

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[4] *See, e.g.*, *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993); *Malcom* v. *National Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993) ("While district courts need not perform any specific rituals or recite any incantations before ordering cases to be consolidated, they must, in every instance, consider whether the 'actions involv[e] a common question of law or fact.'") (alteration in original).

Va. Cir. Ct. Kanawha County, Sep. 6, 2001) (Report of the Honorable Martin J. Gaughn) ("because of the very complicated intertwining of plaintiffs' attorneys, multiple defendants and their defense attorneys, varying exposures to asbestos and different theories of liability, it is futile to continue to pursue small all-issue trials").

But the fact that West Virginia continues to attract the nation's asbestos cases cannot serve as a justification for abandoning the minimum requirements of an orderly and fair adjudication of every litigant's claims and defenses. The consequences of such an approach would be severe. Rule 26.01's lack of any meaningful commonality inquiry practically guarantees that the mass trials conducted under the rule will exceed the limitations of the trial court's resources and the jury's ability to comprehend the voluminous evidence and its connection (or lack thereof) to the differing claims and parties. In short, Rule 26.01 ensures that the most basic requirement of due process – the right to have one's individual claims and defenses heard and evaluated in a meaningful manner[5] – will not be met.

The conflict between Rule 26.01's mass trials and this Court's due process cases is amply demonstrated by the Court's recent decisions in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchen Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). In *Ortiz* and *Amchem*, this Court rejected class-action settlements reached on behalf of two vast classes of plaintiffs whose predominant (and perhaps only) commonality was that they had sometime, somewhere been exposed to some form of asbestos. See *Amchem*, 521 U.S. at

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[5] *See, e.g., Logan* v. *Zimmerman Brush Co.* 455 U.S. 422, 433 (1982) (noting that due process requires that an aggrieved party have "the opportunity to present his case and have its merits fairly judged."); *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

624-27. The Court based these decisions on both the textual requirements of Federal Rule of Civil Procedure 23 and on the inevitable due process concerns that arise when litigants are deprived of an opportunity to have their claims and defenses presented, either personally or through a class representative that shares the represented parties' interests in the litigation. See *Ortiz*, 527 U.S. at 846-48; *Amchem*, 521 U.S. at 624-28. As this Court noted in *Ortiz*, it is "'our "deep-rooted historic tradition that everyone should have his own day in court."'" 527 U.S. at 846 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989), in turn quoting 18 C. Wright et al., *Federal Practice and Procedure* § 4449, at 417 (1981)).

Rule 26.01 deprives mass-trial litigants of their traditional "own day in court" in any meaningful sense. There can be no pretending that hundreds or thousands of litigants with dissimilar factual and legal claims and defenses will have an adequate opportunity to present their evidence and argument to a single finder of fact in any rational manner. This Court has noted the dizzying array of differences among asbestos plaintiffs, including the fact that they may have been:

> "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some ... suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma .... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "... [Non-symptomatic] plaintiffs especially share little in common, either with each other or with the presently injured [plaintiffs]. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories."

Amchem, 521 U.S. at 624 (second omission in original) (quoting *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

Those factual differences are vividly illustrated just by the six asbestos plaintiffs in *Norfolk & Western Railway* v. *Ayers*, No. 01-963 (U.S. granted Apr. 1, 2002), a West Virginia FELA case in which this Court recently granted certiorari. Those plaintiffs worked at the railroad for anywhere between two and forty years, some as early as 1942. They all worked in different places and in different occupations, including office clerk, laborer, pipefitter, fireman, engine repairman, and ballast regulator. Their claimed exposures varied widely in intensity, constancy, and duration, with some lasting decades and another only three months. Most plaintiffs claimed exposure to a variety of dusts other than asbestos, such as silica, coal, and paint dust, each of which could be an alternative source of their claimed injuries. Three had asbestos exposure outside of railroad employment which was relevant to apportionment of causes. One of the plaintiffs did not smoke, whereas others had widely variable smoking habits which could affect the analysis of lung injury. They had varying medical conditions – such as emphysema, chronic bronchitis, chronic obstructive pulmonary disease, pneumonia, cardiovascular disease, and obesity – that affected both the diagnosis of asbestos injury, causation, and the degree of impairment. There were days of competing expert testimony on contested, complex medical evidence about the meaning and implications of each plaintiff's lung x-rays, breathing function tests, lung crackles, and medical histories. See generally J.A. at 365-524, *Norfolk & W. Ry.* v. *Ayers*, No. 01-963 (U.S. filed June 17, 2002).

For the most part, the factual distinctions noted in *Amchem* apply across the spectrum of FELA cases, and therefore the problems of coherently litigating a mass trial when the parties lack commonality will dominate every FELA-based proceeding under Rule 26.01. Moreover, for negligence

claims, the notion that any issue, including "fault," can be determined in a single trial as to a mass grouping of plaintiffs is wrongheaded. Railroads were not manufacturers of asbestos, but rather, used asbestos products, which they purchased from manufacturers, in some of their operations. While there are four defendants in the West Virginia asbestos litigation, each of them had several predecessor railroads – all separate, unaffiliated companies – operating during the relevant time periods. Thus, questions related to what, if anything, each of these railroad asbestos users might have known of asbestos hazards, and when they had such knowledge, are key to determining liability, and the answers may vary from plaintiff to plaintiff.

In addition, an employer's duty of care (which is commensurate with its ability reasonably to foresee a particular injury, *Gottshall*, 512 U.S. at 538) does not exist in the abstract; it is specific to an individual employee and depends on the geographic, temporal and physical characteristics of his work. In other words, whether the railroad was negligent in failing to protect an employee from asbestos exposure depends on the nature of the job; the nature and intensity of the exposure; what was known at the time of employment about asbestos risks; the balance of those known risks against the perceived unique insulation benefits of asbestos products in protecting workers from burns from high-temperature equipment; and what protective measures were available. In short, because Rule 26.01 requires FELA plaintiffs and defendants to present their cases to the finder of fact in concert with myriad others, each FELA litigant's "own day in court" will happen in nothing "more than a fictional sense." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990). This fictional right to be heard is inconsistent with this Court's due process jurisprudence.

B. Certiorari Is Warranted Because Rule 26.01 Undermines The Jury's Ability To Make Informed And Rational Decisions In FELA Cases.

The due process limitation on joinder of factually unrelated claims is not simply a formal construct of the law. Research studies of the jury process support the common-sense notion that in complex cases juries can not effectively adjudicate the factually disparate claims of more than a handful of plaintiffs in a given trial.

The prejudicial effects of the unprecedented mega-trials that Rule 26.01 contemplates can be grouped into several related categories:

1. Temporal And Physical Limitations On A Court's Ability To Hear Evidence

As petitioners set out in detail, the West Virginia Supreme Court's opinion actually contemplates asbestos trials involving thousands of largely unrelated parties. All of these litigants will have an independent interest and right to participate in the trial. All litigants will rightfully want to hear the evidence presented to the jury and to both rebut damaging evidence and present affirmative evidence relevant to their own claims or defenses. In short, it is not hyperbole to say that the trial will involve a huge mob of lawyers, witnesses and litigants.

Merely stating such a proposition unmasks the absurdity of Rule 26.01's approach. The proposed trial proceeding is inherently unworkable, even from a physical and temporal point of view. Even if the members of a jury possessed perfect powers of reason and recall, and even if the span of their effective attention were unlimited, they simply could not hear and see all of the litigants and evidence in the space and time that a court can reasonably provide for a single trial.

2. Human Inattention, Lack Of Comprehension And Forgetfulness

Jurors do not have perfect memories or analytic abilities, and their ability effectively to absorb information diminishes as the length and complexity of a presentation grows. In a study of juror performance, the A.B.A. Section of Litigation concluded that longer trials impair a jury's ability to comprehend the information presented. See Special Comm. on Jury Comprehension, *Jury Comprehension in Complex Cases*, A.B.A. Sec. Lit. Rep. 25, 32 (Dec. 1989) ("The volume of the evidence received at trial has a direct impact on the degree and quality of jury comprehension.... In addition, the longer the trial, the greater the risk that jurors will become bored and that their attention will diminish."). Chief Justice Burger has also commented on the prejudicial effect of complex and lengthy jury presentations. The:

> common sense of the common man ... cannot be brought to bear unless there is comprehension of the facts and the law....
>
> Even Jefferson would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in trials lasting many weeks or months.

Warren E. Burger, *Can Juries Cope with Multi-Month Trials?*, 3 Am. J. Trial Advoc. 449, 451 (1980).

3. Evidentiary Spillover

A further limitation on effective jury service in a Rule 26.01 mass trial is jurors' documented susceptibility to evidentiary "spillover" in lengthy, multi-party or multi-claim trials. The "spillover effect" refers to the jury's tendency to apply evidence in voluminous or lengthy cases to parties and/or claims to which the evidence does not pertain. Studies

have shown that this spillover effect results in higher rates of confusion of evidence and conviction in criminal cases.[6]

In the context of civil litigation, research has similarly demonstrated that while jurors are relatively adept at allocating blameworthiness and making differentiations among litigants in cases where the volume of evidence to be digested in a given time is low, as the evidentiary volume increases, the jury is less and less able to make distinctions of blameworthiness among the parties and claims. See Irwin A. Horowitz et al., *Effects of Trial Complexity on Decision Making*, 81 J. Applied Psychol. 757, 762-63 (1996).

Courts have also recognized the problem of evidentiary spillover when multiple parties or claims are involved in a single trial. For example, in *Baker* v. *Watermann S.S. Corp.*, 11 F.R.D. 440 (S.D.N.Y. 1951), the court determined that consolidation of two cases arising from the same explosion was improper because:

> [t]he nature and extent of the injuries sustained by the plaintiff in each separate action and the period of disability are different. No matter how carefully a jury were instructed as to the separate consideration of the damages of each plaintiff, there is a chance that the jury, after listening to evidence as to pain, suffering and injury of the two plaintiffs may be influenced, subconsciously perhaps, by the more serious injuries of the one plaintiff in reaching its verdict on the case of the other.... A paramount consideration at all times in the administration of justice is a fair and impartial trial to all

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[6] *See* Edith Greene & Elizabeth F. Loftus, *When Crimes are Joined at Trial*, 9 Law & Hum. Behav. 193 (1985); Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. Applied Soc. Psychol. 453 (1982); Irwin A. Horowitz et al., *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. Applied Soc. Psychol. 444 (1980).

> litigants. Considerations of time, money and convenience must yield thereto.

Id. at 440-41; see also *Bradford* v. *John A. Coleman Catholic High Sch.*, 488 N.Y.S.2d 105, 106 (N.Y. App. Div. 1985) ("Plaintiffs were injured in two separate incidents, and each alleges that his or her injury was caused by similar acts of negligence by defendant's employees. Presentation of both claims to the same jury would tend to bolster each claim, to defendants' disadvantage.").

Of course the plaintiffs' bar is aware of these studies and of the coercive threat created by the potential of jury confusion. For them, Rule 26.01's "conjoinder" is not solely for judicial efficiency: they also seek to claim the advantage of a greater likelihood of favorable verdicts due to jury confusion and exhaustion. The plaintiffs' bar in West Virginia promotes these procedures because they favor the vast majority of asbestos plaintiffs: namely, the mildly impaired and those with highly controvertible evidence of asbestos injury. Evidence that one worker has mesothelioma or asbestos-related lung cancer will tend to plant the idea in the jury's mind that the railroad was broadly negligent, even if the exposures are entirely unrelated in time, place, or manner. The presence of truly injured plaintiffs will color the jury's view of the claims of marginally impaired plaintiffs that their injuries are medically attributable to asbestos, and will tend to enhance in jurors' minds arguments for higher damages, including emotional distress damages. With hundreds of claims to be evaluated in one truncated proceeding, the only hope that defendants have of achieving some individualized resolution of their cases and avoiding prejudicial spillover is to seek a pretrial settlement, which (with the threat of a mass trial hanging over defendants), will obviously come at a premium.

II. IMMEDIATE REVIEW IS NECESSARY TO PREVENT FUNDAMENTALLY UNFAIR PROCEEDINGS AND SIGNIFICANT PREJUDICE TO THE APPELLATE PROCESS.

As the foregoing discussion illustrates, Rule 26.01's mass trial mechanism is so fraught with prejudice that there can be no question of individual litigants obtaining a "meaningful opportunity to be heard," *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971), at their """own day in court."""" *Ortiz*, 527 U.S. at 846. Accordingly, this Court need not – and should not – wait to review the constitutionality of Rule 26.01.

A. Immediate Review Is Warranted Because Rule 26.01's Mass Trial Procedure Is Structurally Flawed.

In the criminal context this Court has recognized that some procedures are so inherently unfair that they constitute a structural error in the trial process. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 468-69 (1997); *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). A structural error is a "defect affecting the framework within which the trial proceeds" that is so inherently prejudicial that the "'trial cannot reliably serve its function." *Arizona*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986)).

This Court should grant immediate review because Rule 26.01's shortcomings are analogous to the defects this Court has declared to be structural error. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction structural error because it invalidated all of the jury's findings); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of the right to self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of the right to a public trial). The problems with Rule 26.01's approach are not dependent on the procedural history, trial record or facts of a particular case. Rather, a mass trial of unrelated and conflicting claims is innately prejudicial in all cases for the

same basic reason: it deprives litigants of the right to meaningfully present their claims and defenses to the trier of fact.[7] Without such a presentation, it is impossible to secure a remedy that is appropriate in light of each case's unique circumstances. In short, delaying this Court's review will only result in the unnecessary infliction of constitutional harms.

B. Rule 26.01 Has The Purpose And Effect Of Forcing Defendants To Unfairly Surrender Their Rights Without Trial.

Moreover, this Court should grant immediate review because Rule 26.01's coercive effect will insulate many unconstitutional deprivations of due process from appropriate appellate review.

As the Petition for Certiorari and the West Virginia Supreme Court's decision below suggest, over the past few years West Virginia has become a haven for the nation's asbestos litigation. See *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 303 (W. Va. 1996) (noting the extraordinary volume of asbestos-related actions filed in West Virginia). The fact that the state has become the jurisdiction of choice for asbestos plaintiffs is amply demonstrated by Justice Maynard's concurring opinion in the case before the Court. According to Justice Maynard, in the approximately 8,000 state-law cases currently grouped for mass trial under Rule 26.01, "as many as five thousand of the plaintiffs ... are

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[7] In delineating the right to represent oneself at a criminal trial, this Court has recognized "that the right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others." *McKaskle*, 465 U.S. at 177. Given that this statement was intended to describe the potential for "confus[ing] the message the defendant wishes to convey" when a single standby counsel adds his voice to that of a single defendant, *see id.*, it is not hard to imagine the jury confusion that will result if numerous counsel are each given an opportunity to address the jury regarding an array of factually dissimilar issues.

not West Virginia residents and were never exposed to asbestos in [the] State." Pet. App. 21a.

This phenomenon applies equally to asbestos cases brought under FELA. For example, in a recent asbestos-related case filed against CSX, only 177 out of 917 plaintiffs were residents of West Virginia. Complaint, *Abbott* v. *CSX Transp., Inc.*, No. 01-C-162M (Marshall County Cir. Ct. W. Va. Aug. 1, 2001). In a similar asbestos-related action brought against Norfolk Southern, only 15 of 365 plaintiffs were residents of West Virginia. Complaint, *Adkins* v. *Norfolk S. Ry.*, No. 01-C-183(1-365) (Brooke County Cir. Ct. W. Va. Sept. 13, 2001). The railroads estimate that, in the nearly 6,000 FELA cases pending in West Virginia, approximately 70% of the plaintiffs have no connection whatsoever to the state. These FELA plaintiffs hail from at least eighteen different states.

The reason for this remarkable trend is clear: the plaintiffs' lawyers (who principally represent substantial numbers of asbestos plaintiffs with few or no symptoms of disease) have pressed for procedures and rules that facilitate favorable settlements for their clients. As Justice Maynard stated in his concurrence, out-of-state plaintiffs "migrate[] [to West Virginia] because of the asserted pro-plaintiff bias with which Mobil claims [the] State handles asbestos litigation." Pet. App. 21a. It is clear that the substantive attraction of West Virginia tort law is a factor,[8] but that would not explain the

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[8] *Blankenship* v. *General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991) (in the litigation of vehicle crashworthiness cases under theories of product liability, whenever there is a split of authority in other jurisdictions on an issue about which this court has not yet spoken, the trial court should presume that we would adopt the rule most favorable to the plaintiff); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999) (medical monitoring damages available for asbestos exposure); *Restatement (Third) of Torts: Apportionment of Liability* § 17 reporter's note at 151 (2000) (noting that West Virginia is one of only 14 states that has retained the pure form of joint and several liability, which

vast migration of FELA cases to West Virginia. Those cases come for the procedural advantages the state offers. West Virginia juries are notoriously inclined to large verdicts. Summary dismissal is generally disfavored in West Virginia state courts, so even if a defendant can distinguish frivolous from facially plausible claims based on the pleadings, the defendant may be unable to obtain dismissal of the frivolous suits. Moreover, West Virginia's two-tiered court system provides defendants no right of appellate review in negligence cases, see, *e.g.*, W. Va. R. App. P. 3, 7, and the elected West Virginia Supreme Court of Appeals frequently declines discretionary review to corporate defendants. Railroads, which have been subject to mass complaints in the West Virginia courts for years and trials where their defenses were prejudiced by the improper joinder even of small numbers of factually distinct asbestos plaintiffs, have routinely been forced to settle thousands of truly meritless claims for substantial sums because of the hydraulic pressure of the West Virginia court system.

But the settlement pressures created by these more traditional pro-plaintiff rules pale in comparison to the effects of Rule 26.01. The railroads' experience is that (consistent with the jury research discussed above), trials involving numerous plaintiffs result in damages awards that are skewed towards the most seriously injured plaintiffs while less severely injured (or even uninjured) plaintiffs obtain windfall verdicts. Accordingly, the *in terrorem* effect of a "trial" that will potentially assign billions of dollars in liability based on thousands of claims (without an opportunity for an individualized defense) cannot be overstated. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that the threat of runaway liability in mass tort actions pressures defendants to settle even meritless claims); Henry J. Friendly, *Federal Jurisdiction: A General View* 120

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makes every defendant 100% liable for a plaintiff's injuries regardless of the percentage of fault attributable to each defendant).

(1973) (calling class-action settlements induced by the chance of an enormous verdict "blackmail settlements"). Because of these abnormal pressures, any delay in this Court's review will force many litigants to surrender their constitutional rights in exchange for a release from Rule 26.01's Wonderland procedures.[9]

C. Rule 26.01 Extinguishes Meaningful Appellate Review.

Even apart from the inherent prejudice to defendants' right to a fair trial, Rule 26.01 effectively extinguishes any possibility of a meaningful appeal. This Court knows that any good appellate brief winnows the issues for the reviewing court (and must do so all the more when, as in West Virginia, appellate review is discretionary). See, *e.g.*, *Smith* v. *Murray*, 477 U.S. 527, 536 (1986) (stating that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail ... is the hallmark of effective appellate advocacy.") (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751-52 (1983)). But with mass trials, a defendant would as a practical matter have to forego appeals entirely as to many plaintiffs. Furthermore, neither the West Virginia Supreme Court nor this Court is going to review all the specific judgments against defendants for individualized prejudice. Nothing is to be gained from delaying review until after trial in terms of sharpening the issues; resolution of the constitutionality of Rule 26.01 turns on whether the unprecedented mass trials it orders are inherently prejudicial, and that question is cleanly presented now. Moreover, the stark reality is that the evisceration of appellate review simply

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[9] Under the trial order implementing Rule 26.01, the jury is to select a punitive damages "multiplier" for cases arising under state law (FELA does not authorize punitive damages, *Law* v. *General Motors Corp.*, 114 F.3d 908, 912 (9th Cir. 1997)), before determining liability. This evokes the mandate of the Queen of Hearts: "Sentence first – verdict afterward." Lewis Carroll, *Alice in Wonderland* 98-99, 110 (1923).

adds to the pressure to settle rather than play Russian roulette with the Rule 26.01 regime.

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Rule 26.01 fundamentally alters almost every aspect of FELA litigation, including: (1) the parties' interests in litigating or settling FELA cases,[10] (2) the evidentiary presentation required for a successful FELA trial, (3) the jury's role and competence in evaluating FELA claims, and (4) the ability of the parties and the courts to achieve meaningful appellate review. This Court is the final guardian of federal law. It cannot allow a state court to impose state-law procedural devices that deprive both plaintiffs and defendants of a meaningful opportunity to present their claims and defenses to the trier of fact.

West Virginia's crowded litigation docket will not be magically cured by making the state an even more attractive refuge for tort claims that have little or no connection to the state. Rather than solving a compelling judicial problem, Rule 26.01's system of packaging frivolous claims with those of the seriously injured and coercing a settlement for the entire group will only reward and encourage further forum shopping. It will also undermine the federal interests in due process and the orderly administration of FELA's federal common law. For these and the foregoing reasons, this Court's review is urgently needed.

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[10] While most FELA cases eventually settle before trial, those settlements are based on each party's ability individually to assess the strengths and weaknesses of its case and the costs and risks of going to trial. This typically leads to far more equitable settlements than could ever be obtained where, as here, defendants face the vast prejudice inherent in West Virginia's mass trial scheme.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 02-132

IN THE

Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.

Petitioners,

v.

BRUCE W. ADKINS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE AMERICAN CHEMISTRY COUNCIL

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States ("the Chamber") and the American Chemistry Council ("ACC") hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Consent to the filing of this brief has been obtained from counsel for the petitioners, Mobil Corporation and Honeywell International Inc. Counsel for respondents have refused consent. Copies of the letters giving and refusing consent have been lodged with the Court.

The Chamber is the world's largest business federation and represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and conducting business throughout the United States and around the world. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including another recent case raising questions about West Virginia's approach to asbestos litigation. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *Norfolk & W. Ry. Co. v. Ayers*, No. 01-963 (U.S. 2002).

The ACC is a trade association representing companies engaged in the business of chemistry. Its members include more than 150 leading companies accounting for more than 90 percent of the production of basic industrial chemicals within the United States. The ACC engages in advocacy designed to address major public policy issues of interest to its members.

The issues at stake in this case are of direct concern to *amici* and their members. Many members of the Chamber and the ACC are defendants in the proceedings below, and still others could be named as defendants in future proceedings. Asbestos litigation is a growing concern for members of both *amici*, because the number of asbestos defendants has been increasing in recent years. An August 2001 study by the RAND Institute for Civil Justice reports that more than 1000 corporations have been named as defendants in asbestos suits and predicts that the final list "will ultimately number several times that." Deborah Hensler *et al.*, RAND Inst. for Civil Justice, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 11 (2001). The corporations identified by RAND range across 44 of the Department of Commerce's 82 "Standard Industrial Classifications," which means that they "span more than half of the industries in the economy." *Id.* *Amici*, with their broad membership, are well qualified to offer the views of such a large group of interested parties.

Amici have grave concerns about the immediate and irreparable harm their members will face if this Court does not intervene to correct the federal constitutional errors of the courts below. West Virginia's Trial Court Rule 26.01, which was interpreted below to permit the aggregation of upwards of 8,000 claims against more than 250 defendants without any threshold inquiry into the existence of common questions or the risk of prejudice, violates the due process rights of defendants to a trial in which the fact-finder can make sense of the evidence and defenses. In addition, the ruling below that West Virginia law will govern even claims that have no connection to West Virginia is directly contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

If this Court does not grant certiorari and correct the errors below immediately, defendants, including many of *amici*'s members, will likely never receive relief, because the pressure to settle in the face of potentially crippling liability will be all

but irresistible. And even if end-of-trial review were a reasonable possibility, *amici*'s members would still face irreparable harm in the interim in the form of declining stock prices, reduced access to capital, and, in some cases, perhaps even bankruptcy. Accordingly, *amici* have a great interest in securing expeditious review of the questions presented. The motion for leave to file the attached brief *amici curiae* in support of the petition should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged has no connection at all to the state.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 4

I. THE CURRENT PETITION MAY REPRESENT THE ONLY PRACTICAL OPPORTUNITY FOR REVIEW BY THIS COURT OF THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED BECAUSE THE PRESSURE TO SETTLE IN AGGREGATE PROCEEDINGS IS IRRESISTIBLE .. 5

A. Aggregate Proceedings Place Irresistible Pressure on Defendants to Settle 7

B. The Magnitude of the Constitutional Error Increases the Need for Review 10

II. THE PROSPECT OF AGGREGATE LITIGATION IN WEST VIRGINIA POSES AN IMMEDIATE AND SERIOUS RISK OF HARM TO HUNDREDS OF CORPORATIONS AND THEIR EMPLOYEES IN THE FORM OF DECLINING SHARE PRICES AND LOWER RETIREMENT FUND VALUES ... 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982) 12
Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999) 6
Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 12
Castano v. America Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 9
In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) 5, 11
Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 13
Lienhart v. Dryvit System, Inc., 255 F.3d 138 (4th Cir. 2001) 6
In re Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d 98 (D.C. Cir. 2002) 6
Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) 11, 12
Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001) 6, 8
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 13
Prado-Steiman v. Bush, 221 F.3d 1266 (11th Cir. 2000) 6
In re Repetitive Stress Injury Litigation, 11 F.3d 368 (2d Cir. 1993) 12
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 5, 8
In re Sumitomo Copper Litigation, 262 F.3d 134 (2d Cir. 2001) 6
State ex rel. Allman v. MacQueen, 551 S.E.2d 369 (W. Va. 2001) 3, 8

TABLE OF AUTHORITIES
(Continued)

Page

State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996) 2
State ex rel. Appalachian Power Co. v. Ranson, 438 S.E.2d 609 (W. Va. 1993) 3
Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000) 6

Federal Rules

Fed. R. Civ. P. 23 ..... 6, 7

State Statutes and Rules

W. Va. Code § 23-4-2 (1994 & Repl. Vol. 1998) 4
West Virginia Trial Court Rule 26.01 ..... *passim*

Miscellaneous

Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002) 15, 18

Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001) 8, 17

Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, Briefly . . . Perspectives on Legislation, Regulation, and Litigation (Nat'l Legal Ctr. for the Public Interest, Washington, D.C.), June 2002 ..... 9, 18

TABLE OF AUTHORITIES
(Continued)

Page

Raji Bhagavatula *et al.*, *Asbestos: A Moving Target*, Best's Review, Sept. 2001 18

Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243 (2001) 7

Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002 16

Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 89 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School) 7, 9, 10

Richard O. Faulk *et al.*, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 Tex. Tech L. Rev. 779, 790 (1998) 7

Helen E. Freedman, *Product Liability Issues in Mass Tort — A View from the Bench*, 15 Touro L. Rev. 685 (1999) 18

Deborah Hensler *et al.*, RAND Inst. for Civil Justice, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (2001) 16, 17

Deborah Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 Tex. L. Rev. 1899 (2002) 15, 17

Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179 (2001) 14

TABLE OF AUTHORITIES
(Continued)

Page

Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 Tex. L. Rev. 1925 (2002) 15, 16

Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, Bloomberg News, Feb. 4, 2002 ..... 16, 17

Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821 (1995) 18

MeadWestvaco Stock Drops 20% on Fears of Asbestos Liability, Wall St. J., Aug. 19, 2002 14

Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune, Mar. 4, 2002 ..... 15, 16

Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001) 19

Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000) 9

Danielle Sessa, *Trial Lawyers Turn to New Asbestos Targets*, Chi. Sun-Times, Jan. 22, 2002 14

Paul M. Sherer, *New Credit Aids Federal-Mogul in Asbestos Battle*, Wall St. J., Jan. 4, 2002 15

Jeffrey Tomich, *Ashland Has "Layers" of Asbestos Insurance, CFO Says*, Bloomberg News, Aug. 9, 2002 14

TABLE OF AUTHORITIES
(Continued)

Page

Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002 17

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and conducting business throughout the United States and around the world. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including another recent case raising questions about West Virginia's approach to asbestos litigation. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *Norfolk & W. Ry. Co. v. Ayers*, No. 01-963 (U.S. 2002).

The American Chemistry Council ("ACC") is a trade association representing companies engaged in the business of chemistry. Its members include more than 150 leading companies accounting for more than 90 percent of the production of basic industrial chemicals within the United States. The ACC engages in advocacy designed to address major public policy issues of interest to its members. Asbestos litigation is a growing concern for the chemical industry, as plaintiffs' attorneys are now targeting companies that never manufactured asbestos products.

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[1] Consent from counsel for petitioners Mobil Corporation and Honeywell International Inc. has been filed with the Clerk of this Court. Because counsel for respondents have refused to give their consent, this brief is accompanied by a motion for leave to file a brief for *amici*. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to this brief's preparation or submission.

As explained in more detail in the accompanying Motion, the issues at stake in this case are of direct concern to *amici* and their members. Many of those members are defendants in a large number of the thousands of asbestos product-liability cases consolidated for a mass trial below. As a result of West Virginia's liberal procedures and national reputation as a jurisdiction friendly to asbestos plaintiffs, *amici*'s members also face the prospect of countless additional asbestos suits in West Virginia's courts in the future. *Amici* have grave concerns about the immediate and irreparable harm their members will face if this Court does not intervene to correct the constitutional errors of the courts below.

STATEMENT

This case presents two important constitutional questions regarding aggregate mass-tort litigation: first, whether a court may aggregate thousands of product-liability claims against hundreds of defendants without making a threshold inquiry into the fairness of aggregation and, second, whether a state court may apply its own state law to claims that have not the slightest connection to the state.

These questions arise out of West Virginia's response to the so-called "asbestos litigation crisis" facing courts throughout the country. In the mid-1990s, asbestos claimants from all across the United States began to flock to West Virginia following a ruling that approved a mass consolidation of asbestos cases against 17 different defendants. The early consolidations proceeded under West Virginia's equivalent of Rule 42 of the Federal Rules of Civil Procedure, *see State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 302 (W. Va. 1996), but the West Virginia Supreme Court soon concluded that this traditional procedural device did not give trial judges sufficient "flexibility and leeway with regard to their handling of [mass asbestos] cases." Pet. App. 11a. The court's solution was to promulgate a special mass-litigation rule known as Trial Court Rule 26.01. Pet. App. 11a. The

new rule, which took effect on July 1, 1999, authorizes a panel of state trial judges "[t]o develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice." Pet. App. 36a. The rule itself does *not* mandate any sort of threshold inquiry into the fairness of consolidated proceedings, and the West Virginia Supreme Court held in the decision below that Rule 26.01 dispenses with the findings required under West Virginia's version of Rule 42. In particular, Rule 26.01 does *not* require the court to consider "(1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives." Pet. App. 9a n.12 (quoting *State ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609, 613 (W. Va. 1993)).

In late 2000, the Chief Justice of West Virginia invoked Rule 26.01 and referred all "asbestos-based personal injury cases in West Virginia" to the mass litigation panel. *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001). Of the approximately 8,000 cases believed to be subject to the Chief Justice's referral, as many as 5,000 involve claims by plaintiffs who neither live in West Virginia nor were exposed to asbestos in the state. Pet. App. 21a. The trial judge who was placed in charge of the consolidated cases entered a "master plan" calling for a series of group trials. *See* 551 S.E.2d at 372. On July 6, 2001, the West Virginia Supreme Court rejected the initial plan as not sufficiently expeditious and directed that all pending asbestos trials should commence no later than July 1, 2002. *See id.* at 375, 377. On September 6, 2001, a new supervising judge announced that he would conduct a single "mass trial" of all the consolidated asbestos

claims. A trial scheduling order followed on February 26, 2002, calling for the resolution of all pending claims against three groups of defendants: manufacturers, premises owners, and employers. Pet. App. 25a. Under the scheduling order, the trial is set to commence on September 23, 2002, with simultaneous jury trials for the three groups of defendants in the initial phase and mini-trials afterwards to settle questions of causation and damages. Pet. App. 7a. Claims against employers are to be decided under West Virginia Code § 23-4-2 (1994 & Repl. Vol. 1998). Pet. App. 7a, 25a.

Even before the new judge had entered the trial scheduling order, petitioner Mobil Corporation sought extraordinary relief in the form of a writ of prohibition or mandamus. (Rule 26.01 does not provide for interlocutory appeals.) The West Virginia Supreme Court treated Mobil's petition as a petition for a writ of prohibition, denied the writ, and indicated its intention "to allow the supervising judge to continue to fashion and implement various trial management plans without further intrusion by this Court." Pet. App. 18a.

REASONS FOR GRANTING THE WRIT

As the petition explains, the traditional reasons for granting certiorari are present here: the decision below conflicts with the decisions of federal courts and other state courts concerning an important question of federal law. But *amici* wish to highlight additional reasons why it is important for this Court to grant certiorari, and to grant it now. First, this may be the only chance for review of the constitutional questions presented, because the pressure on petitioners and other defendants to settle if the case is allowed to proceed will be irresistible. Second, petitioners and other defendants, including many of *amici*'s members, face immediate and irreparable harm as a result of decisions like the one below, which threaten to exert downward pressure on their share prices and credit ratings by encouraging the filing of

thousands of baseless claims that could not survive judicial scrutiny except through aggregation.

I. THE CURRENT PETITION MAY REPRESENT THE ONLY PRACTICAL OPPORTUNITY FOR REVIEW BY THIS COURT OF THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED BECAUSE THE PRESSURE TO SETTLE IN AGGREGATE PROCEEDINGS IS IRRESISTIBLE

Review of the West Virginia Supreme Court of Appeals' denial of a writ of prohibition is essential. The decision below is, in every practical sense, a final and blatantly unconstitutional disposition of the proceedings. If the case is allowed to proceed further, the result is all but foreordained, and not only in this case but in others like it: defendants will almost certainly succumb to the pressure to settle before trial. Accordingly, the present petition likely represents the Court's only opportunity to correct the serious constitutional errors below.

Federal courts recognize that in certain cases involving particularly large stakes, postponing review is tantamount to denying review, because the pressure to settle before trial is so enormous. In such cases, courts have not hesitated to grant immediate review of questionable decisions. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (noting that mandamus review of decision to use bellwether trials in a mass proceeding of 3,000 cases "aggregated for trial management" was appropriate because "[t]he pressure on the parties to settle in fear of the result of a perhaps all-or-nothing 'bellwether' trial is enormous"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (citing as one reason for granting mandamus review of a class certification order "the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes" defendants) (emphasis in original).

This Court recently enshrined the same principle in the Federal Rules of Civil Procedure, when it approved Rule 23(f). The new provision rests in part on a concern that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 advisory committee's note; *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting that one of the two purposes of Rule 23(f) is to "provide[] a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial"). The courts of appeals have agreed, without dissent, that "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order," if the lower court's ruling is "questionable." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999); *accord In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142-43 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

The same reasons that once led courts of appeals to review class certification orders under mandamus and now lead them to review such orders under Rule 23(f) lead also to the conclusion that certiorari is appropriate at the present juncture in this case. Indeed, the drafters of Rule 23(f) expressly likened the courts of appeals' "unfettered discretion" under the new provision to "the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23 advisory committee's note.

A. Aggregate Proceedings Place Irresistible Pressure on Defendants to Settle

While aggregation under West Virginia's Rule 26.01 is not precisely the same as class certification, both forms of mass proceeding raise the same concern: the likelihood that "the risk of potentially ruinous liability" will lead defendants to settle without regard to the merits of the underlying case. Fed. R. Civ. P. 23 advisory committee's note; *see also* Richard O. Faulk *et al.*, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 Tex. Tech L. Rev. 779, 790 (1998) (noting that large aggregations raise the same settlement concerns as class actions). The inordinate pressure to settle exerted by the aggregation of claims under rules like West Virginia's Rule 26.01 is obvious. With the addition of each case, the stakes become higher, until finally, when enough cases are brought together in a single proceeding, the defendant faces what one commentator has called the "Armageddon scenario." *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89, 98 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School) [hereinafter "Eskridge Statement"]. If the amount at stake becomes large enough to threaten the continued existence of a corporate defendant, the pressure to settle becomes all but irresistible, even to the most rational of decisionmakers. Faced with the prospect of "losing the company on his or her watch," a general counsel or chief executive officer will often seek to settle even if convinced of the merit of the company's position. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 252 (2001); *see also* Eskridge Statement, *supra* at 98 ("Even risk-neutral people and firms will tend to take too many precautions or pay too high a settlement price when the chance of devastating loss is significant."). As Judge Posner observed of a group of defendants facing the

prospect of as many as 5,000 claims in a single proceeding: "They may not wish to roll these dice. That is putting it mildly." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1298. Even the trial judge below commented that he anticipated mass settlements "[b]ased on the history of previous mass trials." Pet. App. 5a.

While this pressure to settle will presumably exist in any Rule 26.01 proceeding of any size, it is especially dramatic here. The 8,000 or more cases involved in the instant litigation clearly exert an "inordinate" pressure on defendants to settle, *Newton*, 259 F.3d at 164—at least as great as in most class actions. Asbestos trials often produce compensatory-damages awards in the millions of dollars per plaintiff, *see, e.g.*, Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137, 142-43 (2001), raising the prospect in this case of potential compensatory liability in the billions of dollars. When the threat of punitive damages is added—and the trial court recently confirmed, in keeping with its trial scheduling order, that punitive damages will be assessed using a multiplier to be determined by the jury for each defendant—the amount at stake swells to several times that size.

And if the prospect of a massive judgment is not enough to bring any given defendant to the bargaining table, there are other features of the present consolidation that ratchet up the pressure to an even higher level. First, the aggregation of *all* pending asbestos product-liability cases in West Virginia, *see Allman*, 551 S.E.2d at 372, has inevitably resulted in the lumping together of seriously ill claimants with unimpaired claimants. Under ordinary circumstances, defendants might wish to settle only with ill claimants, but aggregation effectively deprives them of that option. The risk of not settling cases filed by unimpaired plaintiffs is that a jury will not carefully discriminate among the various individual claims

but will simply lump them together in reaching a decision in favor of plaintiffs. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims."). Indeed, empirical research shows that "aggregation of most-injured plaintiffs with less-injured plaintiffs significantly increased the mean awards to the latter." Eskridge Statement, *supra*, at 96. Moreover, there have been reports that some plaintiffs' lawyers and courts will not permit defendants to settle the claims of sick plaintiffs unless they agree to settle the claims of unimpaired plaintiffs as well. *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, Briefly . . . Perspectives on Legislation, Regulation, and Litigation (Nat'l Legal Ctr. for the Public Interest, Washington, D.C.), June 2002, at 23; Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 255 (2000). Aggregation thus raises the stakes by forcing defendants to take account of weak cases that might not otherwise figure in their settlement calculations.

Second, the presence of upwards of 250 co-defendants (Pet. App. 147a-156a) makes the decision not to settle riskier. In the ordinary consolidated case, including the ordinary class action, there is only one defendant, or at most a handful of defendants. A defendant deciding whether to settle in such a case need not consider the likely actions of other defendants. In a consolidation like the one ordered below, by contrast, each defendant must consider the possibility that other defendants will settle early and on favorable terms, leaving the hold-outs to face the prospect of dividing a massive award among them. As Professor Eskridge has explained, the presence of a large number of defendants will often lead to a "rush to settle." Eskridge Statement, *supra*, at 99. This is a "consequence of a classic prisoners' dilemma: Although

defendants realize that they should bargain as a group with plaintiffs' counsel, each defendant also understands that it can gain an advantage by settling early, and that it will be disadvantaged if others settle first (the sucker's payoff)." *Id.*

The questions raised by West Virginia's approach to aggregation are thus largely immune to end-of-trial review. As a result, if this Court does not intervene now, Rule 26.01 and West Virginia's unconstitutional approach to choice-of-law issues will go unchallenged.

B. The Magnitude of the Constitutional Error Increases the Need for Review

The likelihood that mass settlement will deprive this Court of any later opportunity to answer the questions presented in the petition is especially troubling, because both the mass trial and the decision to apply West Virginia law to claims utterly unconnected to West Virginia violate the Constitution in fundamental ways. The West Virginia Supreme Court, through the promulgation of Rule 26.01 and through the ruling below, has instituted an entirely new form of aggregate proceeding that shares many of the same characteristics as class actions and Rule 42 consolidations, but has none of their procedural protections. In effect, it has devised a semantic solution to the problem of managing a massive asbestos docket—by giving mass aggregation a new rule number, it thinks to have dispensed with the need for any of the protections associated with rules numbered 23 and 42. The decision below was explicit on this point: "the adoption of [Trial Court Rule] 26.01 has effectively superseded the requirement that the [Rule 42] factors be used in all mass trial cases, especially where, as here, the cases proceed independent of the consolidation mechanisms set forth in Rule 42." Pet. App. 13a. Among other things, this means that a trial court proceeding under Rule 26.01 need not consider "whether the risks of prejudice and possible confusion

outweigh the considerations of judicial dispatch and economy." Pet. App. 9a n.12.

But while the West Virginia Supreme Court has succeeded in changing the form of the mass trial, it has done nothing to change its substance. The proceeding called for by the trial scheduling order is every bit as complex and troublesome as proceedings that federal and state courts have rejected on constitutional grounds in the past. The trial court has decided to conduct a single mass trial, in three simultaneous phases, to determine liability in 8,000 or more cases involving 250 or more defendants. Pet. App. 3a & n.3, 147a-156a. Represented by 30 or more law firms, plaintiffs claim to have used dozens of different products with different characteristics, different labels, and different applications at hundreds of different sites scattered across the country. Pet. App. 20a-21a. Despite this remarkable diversity of claims, the trial court opted for a single mass trial without making any preliminary findings about the presence of common issues or the fairness of aggregate proceedings, and, as noted above, did so with the blessing of the West Virginia Supreme Court. To ease the way to a single verdict, the trial court declared (and the West Virginia Supreme Court agreed) that West Virginia law would govern claims against all employer-defendants, even though more than 5,000 of the plaintiffs have no connection to West Virginia aside from a common interest in availing themselves of its "pro-plaintiff" procedures. Pet. App. 7a, 21a, 25a.

If the authority for this extraordinary proceeding had a more familiar name than "Rule 26.01," its many constitutional defects would be clear. First, Rule 26.01 dispenses with constitutionally necessary inquiries into commonality and the risk of prejudice. *See, e.g.*, *In re Chevron*, 109 F.3d at 1019 (granting mandamus and rejecting trial plan calling for a "unitary trial" of 3,000 crude-oil-contamination cases without "identify[ing] any common issues"); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993) (noting that failure to

inquire into the existence of common questions of law or fact before consolidating 600 asbestos claims brought by plaintiffs exposed to asbestos in power-generating stations was a denial of "basic fairness"); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993) (granting mandamus and reversing consolidation of 44 lawsuits alleging injuries arising from "repetitive stress" on ground that plaintiffs failed to carry burden "on the party seeking aggregation of discovery or other proceedings to show common factual or legal issues warranting it"). Without such inquiries, the risk that the finder of fact will not be able to consider the evidence rationally becomes intolerable. *See Malcolm*, 995 F.2d at 352. It is unreasonable, for example, to expect a jury confronted with 8,000 claims against more than 250 defendants to spend much time thinking about the differences between companies that manufactured masks and respirators, companies that manufactured automobiles, and companies that manufactured insulation, and yet those differences could be decisive in fairly determining liability.

Second, the plan devised by the trial court to implement Rule 26.01 poses a grave risk of violating due process by separating the liability trial from the claims of individual plaintiffs. Pet. App. 25a-27a. The complete absence of evidence pertaining to individual plaintiffs in the initial phase poses a serious risk of creating "a sterile or laboratory atmosphere in which causation is parted from the reality of injury." *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982). In such an atmosphere, plaintiffs are free to "piece[] together" a "perfect plaintiff," a "fictional composite" that has suffered all of the harm alleged in the case at the hands of all defendants, even though no one plaintiff could ever really have been so harmed. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998). To force defendants to defend against such a sympathetic fiction is obviously unfair. *See id.* at 345.

Third, a massive aggregation like the one proposed below inevitably requires separate fact-finders to consider interrelated and interwoven factual questions that can only fairly be addressed by a single fact-finder. *See, e.g.*, *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931) (noting that where two issues are "so interwoven" that one "cannot be submitted to the jury independently of the [other] without confusion and uncertainty," trying the two issues separately "would amount to a denial of a fair trial"). In this case, one jury will decide liability and other juries will decide causation and damages. Pet. App. 25a-28a. It is unclear, however, how the subsequent juries deciding cases involving individual plaintiffs and defendants will be able to make sense of a verdict arising out of the simultaneous trial of several hundred defendants. As for the choice-of-law ruling, Justice Maynard correctly observed in his concurring opinion below (Pet. App. 21a-22a) that it raises equally clear constitutional issues, running afoul as it does of this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). But clear as these violations are, if this Court declines to grant certiorari now, they will go unanswered, and not only now but into the indefinite future.

II. THE PROSPECT OF AGGREGATE LITIGATION IN WEST VIRGINIA POSES AN IMMEDIATE AND SERIOUS RISK OF HARM TO HUNDREDS OF CORPORATIONS AND THEIR EMPLOYEES IN THE FORM OF DECLINING SHARE PRICES AND LOWER RETIREMENT FUND VALUES

Even if there were some realistic possibility of post-trial review in this case, the likelihood of immediate and irremediable harm to the financial health of defendants and other companies facing asbestos liability as a result of continued proceedings in West Virginia would justify an immediate grant of certiorari. The prospect of mass proceedings has an immediate effect on share prices and the value of employee retirement plans and even has the potential

to force companies into bankruptcy. The harm inflicted as a result is beyond the power of a court to remedy; the best a court can do is to intervene and order an end to the unconstitutional proceedings as quickly as possible.

The sensitivity of share prices to the prospect of asbestos liability is well documented. *See generally* Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 190 (2001) ("If the [consolidated] cases are tried, the potential for large verdicts may drive stock prices lower."). Examples abound of companies whose share prices dropped, sometimes precipitously, in direct response to reports of asbestos liability. Perhaps the most recent example is MeadWestvaco Corporation, a large paper and packaging company, whose share value declined over 20% in a single day (August 16) after the company announced that it had been named as a defendant in some 500 asbestos cases involving 6,000 plaintiffs. *MeadWestvaco Stock Drops 20% on Fears of Asbestos Liability*, Wall St. J., Aug. 19, 2002, at C11. The majority of these suits, according to the company's announcement, are pending in West Virginia, Illinois, and Mississippi. *See id.* Other companies have had similar experiences. Most notoriously, oil-field supplier Halliburton's shares dropped 42% in a single day after the company announced that it had lost a $30 million asbestos verdict in Texas. *See* Danielle Sessa, *Trial Lawyers Turn to New Asbestos Targets*, Chi. Sun-Times, Jan. 22, 2002, at 47. Ashland, a major chemical company, saw its share price tumble 17% in a single day, "the biggest one-day decline in at least 22 years, after Goldman, Sachs & Co. and Banc of America Securities downgraded the U.S. company," citing "asbestos concerns" as a key factor. Jeffrey Tomich, *Ashland Has "Layers" of Asbestos Insurance, CFO Says*, Bloomberg News, Aug. 9, 2002. Commenting on Ashland's experience, an analyst explained that "[a] downgrade over asbestos 'is like shouting fire in a crowded place.'" *Id.* Dow Chemical's

shares lost approximately one-third of their value "in a little over a month after analysts became concerned about asbestos claims against Dow's Union Carbide Unit." Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 340-41 (2002). Shares of 3M lost 13% of their value over a similar period "due to lawsuits involving respirators (breathing masks)." *Id.* at 341. And Georgia-Pacific Corporation's "stock fell thirty-seven percent because of anticipated asbestos claims." *Id.*; *see also* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune, Mar. 4, 2002, at 154, 156 (reporting that Federal-Mogul's shares lost 99% of their value and Owens Corning's lost 97% of their value as a result of asbestos liability in the years leading up to their bankruptcy filings); Paul M. Sherer, *New Credit Aids Federal-Mogul in Asbestos Battle*, Wall St. J., Jan 4, 2001, at A10 (noting an 81% decline in the value of Armstrong's shares over a one-year period as a result of asbestos liability).

The harm caused by the prospect of asbestos litigation extends beyond declining share prices. Mounting asbestos liability can limit a company's access to capital. For example, "uncertainty surrounding Halliburton's asbestos exposure" led Moody's Investor Service and Standard & Poor's to cut Halliburton's long-term bond rating. Behrens, *supra*, at 341. *See generally* Deborah Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 Tex. L. Rev. 1899, 1909 (2002) (noting that lawyers for asbestos defendants reported that their clients' "access to capital diminished"). And, of course, the prospect of vast asbestos liability can drive a company into bankruptcy. "At least fifty-five publicly traded companies have declared bankruptcy as a consequence of their asbestos liabilities." Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 Tex. L. Rev. 1925, 1931 (2002). The list of companies driven to seek bankruptcy protection includes such

familiar names as Owens Corning, U.S. Gypsum, and W.R. Grace. *See id.*

While lower stock prices and reduced access to capital may be understandable to some extent where asbestos manufacturers are concerned, the impact of asbestos litigation is increasingly being felt by companies whose connection to the asbestos industry is tenuous at best. The new asbestos defendants include such unusual suspects as media companies, car manufacturers, and even the maker of Scotch tape. *See* Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002. A recent study by the RAND Institute for Civil Justice reports that more than 1,000 corporations have been named as defendants in asbestos suits, with the number expected to grow to "several times that." Deborah Hensler *et al.*, RAND Inst. for Civil Justice, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 11 (2001). The corporations sued to date fall into 44 of the Commerce Department's 82 industrial classifications, meaning that affected firms "span more than half of the industries in the economy." *Id.* The potential impact of asbestos liability on these firms is staggering, with one estimate (from actuarial consulting firm Tillinghast-Towers Perrin) setting total liability as high $200 billion. *See* Parloff, *supra*, at 155-56.

And, of course, the impact of declining stock prices and corporate bankruptcies is not felt only in corporate boardrooms. Often the people most profoundly affected are employees whose retirement plans are heavily invested in corporate stock. The experience of auto-parts manufacturer Federal-Mogul is instructive. Federal-Mogul purchased T&N Plc, "a British company with substantial asbestos liabilities" in 1998. Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, Bloomberg News, Feb. 4, 2002. Soon afterwards, its share price began to fall, from $72 in mid-1998 to just over $1 at the end of July 2001, when the company was on the verge of filing for bankruptcy protection. *See id.* As a result, the value of Federal-Mogul shares in its employees

401(k) accounts—shares that represented one-third of the assets in those accounts at the end of 1998—declined approximately $70 million between the end of 1998 and 2001. *See id.*; *see also* Behrens & Parsons, *supra*, at 141 (noting that employees of companies facing asbestos liability "may lose their investments in company stock").

Past experience demonstrates that ordinary, individual asbestos suits, especially in jurisdictions perceived as being friendly to plaintiffs, can have an immediate impact on share values and can even prompt a company to enter bankruptcy. *See, e.g.*, Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, A12 (reporting that U.S. Gypsum and Federal-Mogul both sought bankruptcy protection in response to a single verdict in Texas). The impact can be expected to be far more dramatic in this case, which is not ordinary by any measure. The new approach to mass litigation instituted by the West Virginia courts represents a potential sea-change in the course of asbestos litigation nationwide, to which the markets can be expected to respond with more-than-ordinary vigor. If West Virginia is allowed to proceed with its extraordinarily loose aggregation procedure and to apply its own laws to suits that have nothing to do with West Virginia aside from the fact of having been filed there, the state could well become the forum of choice for asbestos litigation, giving its procedures a national rather than an exclusively local significance.

Already there are signs that plaintiffs' lawyers have heard the siren call of West Virginia and other "pro-plaintiff" states. Justice Maynard commented below on the "improper pilgrimage" of asbestos cases that "have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." Pet. App. 21a. Commentators and journalists have remarked upon the mobility of asbestos litigation, as well. *See, e.g.*, Hensler, *As Time Goes By*, *supra*, at 1922 (noting reports that tort reform

in Texas provoked "a substantial shift of case filings to Mississippi"); Bell, *supra*, at 17 ("In addition to the Mississippi counties, other notoriously pro-plaintiff jurisdictions crowded with asbestos cases include certain locales in Texas, West Virginia, Louisiana, New York, and California."); Raji Bhagavatula *et al.*, *Asbestos: A Moving Target*, Best's Review, Sept. 2001, at 85, 90 ("Aggregation also has allowed the migration of claims to venues that are friendly to plaintiffs.").

Adding to the potential of this case to alter the asbestos landscape in a way that will have a profound impact on affected companies is the well-noted tendency of lax aggregation rules to expand the number of litigants and thus to raise the stakes. Asbestos litigation is the classic example of what Professor Francis McGovern has dubbed an "elastic" tort. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1827 n.26 (1995). Asbestos-related claims are elastic because "the number of cases that are filed (demand) rises as the transaction costs associated with each case (price) are reduced and the number of judicial case resolutions increases (supply)." *Id.* This elasticity is a matter of common knowledge. Professor McGovern himself cites the example of one Baltimore trial court's experience with its asbestos docket. Faced with a backlog of some 2,000 cases, the court "decide[d] to adopt an innovative, common-issue trial so that individual cases could be streamlined." *Id.* at 1840. But instead of clearing the backlog, this decision prompted "plaintiffs' counsel to file an additional 6,500 cases, most of which probably would not have been filed absent the common-issue trial." *Id.*; *see also* Behrens, *supra*, at 350 ("Mass trial procedures also add to the asbestos litigation 'traffic jam' by encouraging the filing of weak claims"); Helen E. Freedman, *Product Liability Issues in Mass Tort—View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (noting that the increased efficiency associated with consolidation "may encourage additional filings and provide an overly hospitable

environment for weak cases"); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 2 (2001) ("Judges, in an effort to clear their dockets, have often adopted case management techniques that have actually encouraged more and more asbestos claims, particularly by claimants who are, at best, mildly impaired or more recently, not sick at all."). If West Virginia's approach to aggregation and choice-of-law is allowed to stand, the number of filings will almost certainly rise dramatically, and many cases will be filed that would never have been filed at all in a more restrictive legal environment. The presence of more plaintiffs can only increase the stakes, giving investors more reason to look at affected companies with a jaundiced eye. This is also why the West Virginia Supreme Court's plea that the asbestos crisis has forced it to take unusual steps (Pet. App. 11a-12a) is not convincing. That court's solution only makes the problem worse.

Investors and rating agencies will plainly react negatively to the prospect of a new and unusually liberal form of mass litigation in a state that is widely perceived to have a "pro-plaintiff bias." Pet. App. 21a. The harm that results will be irreparable. Injuries like declining stock prices and lowered credit ratings are, by their very nature, not redressable by judicial process. No court can restore a company's stock price or order Moody's to increase a company's rating. And if certain companies choose to file for bankruptcy rather than face a West Virginia jury, their decisions will not be undone by an eventual reversal. The only way to address the harm, which is a direct consequence of the constitutional violations at the bottom of this case, is to grant review and reverse the lower court's decision now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE COALITION FOR ASBESTOS JUSTICE, INC. IN SUPPORT OF PETITIONERS

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COALITION FOR ASBESTOS JUSTICE, INC.'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the Coalition for Asbestos Justice, Inc. ("Coalition") requests leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.[1]

[1] Respondents' counsel did not consent to the filing of *amicus* briefs in this action. Petitioners' blanket letter of consent has been lodged with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and

The Coalition was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] This Coalition files *amicus* briefs in important cases, such as this one, that may have a significant impact on the asbestos litigation environment.

The Coalition seeks leave to file a brief in this case because we are concerned about problematic trends in asbestos litigation. As far back as 1991, the Judicial Conference described a looming "disaster of major proportions." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 2 (Mar. 1991). Five years ago, the Court recognized that this country is in the midst of an "asbestos-litigation crisis." *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 597 (1997). Since then, the crisis has worsened. *See* The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), available at http://www.nlcpi.org. Claims continue to pour in at an extraordinary rate, scores of employers have been forced into bankruptcy, and payments to the sick

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no person or entity, other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

[2] The Coalition for Asbestos Justice, Inc. includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

are threatened. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

The rate of new filings and the mounting number of pending cases have only exacerbated the crisis. Long delays in resolving claims remain routine. *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993). Bankruptcies increasingly threaten the ability of asbestos defendants to compensate seriously ill plaintiffs, now and in the future. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002). The total cost to the economy is staggering.

Courts themselves are partly to blame for the ever-growing "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School). In lowering the legal barriers to recovery, courts have invited more and more claims. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000). Today, the vast majority of new asbestos claimants are unimpaired or only mildly impaired. Payments to those claimants have encouraged still more filings, forcing scores of companies into bankruptcy. Those bankruptcies, in turn, have put more pressure on the remaining solvent defendants and encouraged plaintiffs and their lawyers to seek out companies with attenuated connections to asbestos, such as Petitioner Mobil Corporation. *See, e.g.*, Susan Warren, *Asbestos Suits Target*

Makers of Wine, Cars, Soups, Soaps, Wall St. J., Apr. 12, 2000, at B1.

The instant case exemplifies the problems that are created when courts allow the mass resolution of asbestos claims to predominate over fairness or sound public policy. As West Virginia Supreme Court of Appeals Justice Elliott Maynard has explained:

> [T]his litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring). There will be virtually no opportunity for any defendant in the action to contest the individual claims against it. Furthermore, any defendant deciding to run the risk of such a massive trial may be subject to enormous punitive damages liability. The coercive terms of the plan obviously contemplate (or count on) mass settlements to simplify trial matters and block post-trial review. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"). Such procedural shortcuts are not permitted by due process.

Furthermore, the West Virginia trial plan represents bad public policy because it will worsen the litigation crisis. The plan will encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants."

The Coalition for Asbestos Justice, Inc. is well-suited to bring these matters to the Court's attention. Accordingly, the Coalition requests that the Court grant its motion for leave to file the accompanying *amicus curiae* brief in support of the Petition for a Writ of Certiorari in this action.

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
INTEREST OF *AMICUS CURIAE*		1
STATEMENT OF THE CASE		2
SUMMARY OF ARGUMENT		2
ARGUMENT		6
I.	THE CURRENT CRISIS	6
II.	THE SUBJECT MASS TRIAL PLAN VIOLATES DUE PROCESS AND WILL WORSEN THE CRISIS	11
III.	THE INSTANT PETITION SHOULD BE GRANTED	15
CONCLUSION		18

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) ..... *passim*

Cain v. Armstrong World Indus., 785 F. Supp. 1448 (S.D. Ala. 1992) 13

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 5

Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998) 17

Dunn v. Hovic, 1 F.3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-CorningFiberglas Corp. v. Dunn* 510 U.S. 1031 (1993) 14, 17

Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) 13

In re Asbestos Litig. Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) 15

In re Asbestos Litig. Civ. Action No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va. Aug. 12, 2000) 13

In re Asbestos Prods. Liab. Litig. (No. VI), 1996 WL 539589 (E. D. Pa. Sept. 12, 1996). 8

In re Brooklyn Navy Yard Asbestos Litig.,
971 F.2d 831 (2d Cir. 1992)..... 13

In re Chevron U.S.A., Inc.,
109 F.3d 1016 (5th Cir. 1997) 13

In re Collins, 233 F.3d 809 (3d Cir.2000),
cert. denied sub nom. Collins v.
MacMillan Bloedel, Inc., 532 U.S. 1066
(2001)..... 8

In re Gen. Motors Corp. Pick-Up Truck Fuel
Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.)
cert. denied, 516 U.S. 824 (1995)..... 14

In re Joint E. & S. Dists. Asbestos Litig.,
129 B.R. 710, 737 (Bankr. E. & S.D.N.Y.
1991), *vacated*, 982 F.2d 721
(2d Cir. 1992), *opinion modified on*
reh'g, 993 F.2d 7 (2d Cir. 1993)..... 9

In re Personal Injury and Wrongful Death
Asbestos Cases, Civ. Action No.
24-X-92-344501 (Cir. Ct. Baltimore City,
Md. Aug. 15, 2002) (Memorandum Opinion
and Order Denying Modification to
Inactive Docket Medical Removal Criteria)..... 8

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293
(7th Cir.), *cert. denied*, 516 U.S. 867 (1995).....5, 14

Malcolm v. Nat'l Gypsum Co., 995 F.2d 346
(2d Cir. 1993)..... 13

Metro-North Commuter R.R. Co. v. Buckley,
521 U.S. 424 (1997)..... 16

Norfolk & Western Ry. Co. v. Ayers,
No. 01-963 (U.S. 2002)..... 16

Ortiz v. Fibreboard Corp., 527 U.S. 815
(1999).....*passim*

State ex rel. Appalachian Power Co. v.
MacQueen, III, 479 S.E.2d 300
(W. Va. 1996) 11, 17

State ex rel. Mobil Corp v. Gaughan, 563 S.E.2d
419 (W. Va. 2002), concurring opinion filed
at 565 S.E.2d 793 (W. Va. 2002).....5, 17

TXO Prod. Corp. v. Alliance Res. Corp,
509 U.S. 443 (1993)..... 13

Todd-Stenberg v. Dalkon Shield Claimants Trust,
56 Cal. Rptr. 2d 16 (Cal. Ct. App. 1996)..... 13

Union Pac. Res. Group, Inc. v. Hawkins,
51 S.W.3d 741 (Tex. App. 2001)..... 13

OTHER REFERENCES AND AUTHORITIES

Mark A. Behrens, Editorial, *When the Walking*
Well Sue, Nat'l L.J., Apr. 29, 2002, at A12 16

Mark A. Behrens & Monica Parham,
Stewardship for the Sick: Preserving Assets
For Asbestos Victims Through
Inactive Docket Programs,
33 Tex. Tech. L. Rev. 1 (2001)..... 8

Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001) 14

Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002) 10

The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), available at http://www.nlcpi.org) .....*passim*

Alex Berenson, *A Surge in Absestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1..... 6

Jennifer L. Biggs *et al.*, *Overview of Asbestos Issues and Trends* (Dec. 2001), available at http://www.actuary.org/mono.htm..... 8

Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243 (2001) 15

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14..... 9

Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22.....9-10

Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993) ..... *passim*

Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike In Claims, Vol. 15, No. 23 Mealey's Asbestos Rptr., Jan. 5, 2001 10

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. On the Judiciary, 106th Cong. (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) ..... *passim*

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School) ..... *passim*

The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr.) 4, 11

Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts – View From the Bench*, 15 Touro L. Rev. 685 (1999) 15

Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1 6

Deborah Hensler *et al.*, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (RAND Inst. for Civil Justice, 2001) (preliminary report) 11

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report To The Chief Justice of the United States And Members of the Judicial Conference of the United States* (Mar. 1991) ..... *passim*

Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6 9

Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years, 14 Mealey's Litig. Rep.: Asbestos 22, June 18, 1999 6

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595 (1997) 4

"Medical Monitoring and Asbestos Litigation" – A Discussion With Richard Scruggs and Victor Schwartz, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 8-9

Christopher Oster, *Some Insurers Face Shortfall in Reserves For Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4 7

Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 154..... 6

Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Mealey's Litig. Rep.: Asbestos, Vol. 16, No. 6., Apr. 20, 2001 9

Eric Roston, *The Asbestos Pit,* Time, Mar. 11, 2002, Y9 6

Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001) 2

Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1 10

Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000) .....*passim*

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36 9

Tillinghast-Towers Perrin Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost $200 Billion, June 13, 2001, available at http://www.towers.com/ towers/locations/uk/press%20release/06-13-01.html 7

Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1 9

Susan Warren, *Asbestos Suits Target Makers Of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1 .....3, 10

IN THE

Supreme Court of the United States

No. 02-132

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

COALITION FOR ASBESTOS JUSTICE, INC.'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by

[1] No counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] In important cases that may have a significant impact on the asbestos litigation environment, the Coalition files *amicus curiae* briefs before state courts of last resort and this Court.

STATEMENT OF THE CASE

The Coalition adopts and incorporates Petitioners' statement of the case.

SUMMARY OF ARGUMENT

Five years ago, the Court in *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 597 (1997), recognized that this country is in the midst of an "asbestos-litigation crisis." Since then, the crisis has worsened. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001). Today, the vast majority of new asbestos claimants are unimpaired or only mildly impaired. Payments to those claimants have encouraged still more filings, forcing scores of employers into bankruptcy. Those bankruptcies, in turn, have put more pressure on the remaining solvent defendants and encouraged plaintiffs and their lawyers to seek out companies with attenuated connections to asbestos. Household names such as Gerber Products Co., Ford Motor Co., Campbell Soup Co., AT&T Corp., and Petitioner Mobil Corporation, among others, have been

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[2] The Coalition for Asbestos Justice, Inc. includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

named as defendants. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1.

Courts themselves are partly to blame for the ever-growing "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School) [hereinafter "Eskridge Testimony"]. In lowering the legal barriers to recovery, courts have fueled the fire, inviting more and more claims. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000) [hereinafter "Schwartz & Lorber"].

The courts have undoubtedly acted with the best of intentions – faced with overwhelming numbers of asbestos claims, they have worked to put money in the hands of the sick as quickly as possible, and also to clear crowded dockets. The "pile on" litigation situation is reflected in a thoughtful statement by former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr., who observed:

> Think about a country circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed

> and dictate case consolidation even where the rules may not allow joinder.

The Fairness in Asbestos Compensation Act of 1999: The Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999)(statement of the Hon. Conrad L. Mallett, Jr.) [hereinafter Mallett Testimony].

Justice Mallett's observation explains how courts, such as those in West Virginia, may view "mass joinder" and "jumbo" consolidations as a quick way to resolve the worsening asbestos litigation problem. In such proceedings, as here, people with serious illnesses, such as mesothelioma or lung cancer, are lumped together with the unimpaired. The goal is to produce settlements with low transaction costs, even if it means trampling over the due process rights of defendants and the truly sick. Efficiency is promoted over fairness or reason. In cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries, or no injury at all.

As it turns out, bending procedural rules to put pressure on defendants to settle, *see* Eskridge Testimony at 39-40, brings no lasting efficiency gains. Rather than making cases go away, it invites new ones. *See* Schwartz & Lorber, *supra,* at 248. As mass tort expert Francis McGovern has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

The instant case exemplifies the problems that are created when courts allow the quick resolution of asbestos

claims to predominate over all other issues in litigation. As West Virginia Supreme Court of Appeals Justice Elliott Maynard explained:

> [T]his litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring). The obvious goal of the West Virginia proceeding is to try to force a mass settlement, even if it means trampling over the due process rights of defendants and the truly sick. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("judicial blackmail").

Such procedures only make matters worse. They encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants." This Court is uniquely situated to protect the litigants' due process rights. It should do so, and send a clear signal to

state courts that fairness and rationality must be restored to asbestos litigation.

For the foregoing reasons, *amicus curiae* requests that this Court grant the Petition for a Writ of Certiorari.

ARGUMENT

I. THE CURRENT CRISIS

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an "asbestos-litigation crisis." *Amchem*, 521 U.S. at 597. Many believed that asbestos litigation would be a serious but diminishing problem in the years to come.

Instead of declining, however, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), available at http://www.nlcpi.org.[3] In 2001 alone, plaintiffs filed at least 90,000 new claims. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1. More recent projections estimate that up to 700,000 more cases are expected by the year 2050. *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 Mealey's Litig. Rep.: Asbestos 22 (June 18, 1999). All told, the number of future claim-

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[3] *See, e.g.*, Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 154; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1; Eric Roston, *The Asbestos Pit*, Time, Mar. 11, 2002, Y9.

ants could reach as high as 3.5 million. *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991) [hereinafter "Judicial Conference Report"]. The total cost to the economy is staggering.[4]

The vast majority of new asbestos claimants are unimpaired – "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter "Edley Testimony"]. In *Amchem*, 521 U.S. at 629, Justice Breyer observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." That number may be conservative. For instance, Professor Edley estimated in 1992 that claims by unimpaired plaintiffs then accounted for 60 to 70 percent of new claims, with the trend toward unimpaired claimants steadily increasing. *See* Edley Testimony at 5. Some current estimates are as high as 90

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[4] Ratings agency A.M. Best estimates that asbestos litigation already has cost U.S. companies over $21.6 billion, and may cost another $43.4 billion over the next 20 years. *See* Christopher Oster, *Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4. At least one consulting firm has put the total future cost of the litigation at $200 billion. *See Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, available at http://www.towers.com/towers/locations/uk/press%20release/06-13-01.html. Former U.S. Attorney General Griffin Bell has explained that the cost "exceeds current estimates of the cost of all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Bell, *supra*, at 4.

percent. *See* Jennifer Biggs *et al.*, *Overview of Asbestos Issues and Trends* 3 (Dec. 2001), available at http://www.actuary.org/mono.htm.

The problem presented by these claims is self-evident: they create judicial backlogs and exhaust scarce resources that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted); *see also In re Personal Injury and Wrongful Death Asbestos Cases*, Civ. Action No. 24-X-92-344501, at 5-6 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Inactive Docket Medical Removal Criteria) (Rombro, J.) ("With the number of companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos."); Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 393 (1993); Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001).[5]

Indeed, lawyers who represent the truly sick have expressed concern that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation. *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor*

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[5] Federal District Judge Charles Weiner, who oversees the federal asbestos multidistrict proceedings, has explained that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignant cases." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E. D. Pa. Sept. 12, 1996).

Schwartz, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 (Scruggs: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."); Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36 (quoting plaintiffs' lawyer Steve Kazan as stating that weak asbestos cases are taking awards that could go to legitimate claimants, such as mesothelioma victims).[6]

Payments to the unimpaired have played a critical role in forcing nearly 60 companies into bankruptcy. Each new bankruptcy puts "mounting and cumulative" financial pressure on the remaining defendants, whose resources are limited, *see* Edley & Weiler at 392, and removes one more source of funds from the pool available to asbestos claimants. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Mealey's Litig. Rep.: Asbestos, Vol. 16, No. 6., Apr. 20, 2001.

Bankruptcies also have led plaintiffs and their lawyers to expand their search for new "deep pockets," *see* Edley & Weiler at 384, 394-95; *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993), "from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14; *see also* Editorial, *The Job-*

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[6] *See also* Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1; Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6.

Eating Asbestos Blob, Wall St. J., Jan. 23, 2002, at A22.[7] Defendants now include household names such as Gerber Products Co., Ford Motor Co., Campbell Soup Co., and AT&T Corp., among others. *See, e.g.*, Warren, *supra, at* B1; Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1. Petitioner Mobil Corporation is another example. Mobil is "not an 'asbestos company'" – it did not produce or market asbestos-containing products, and "has no corporate relationship with any entity that does." Pet. for a Writ of Cert. at 4.

In sum, the combination of forces at work in the asbestos litigation has set off a chain reaction, or domino effect: payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted the assets of the defendant companies and forced many of them into bankruptcy; as more companies have been driven into bankruptcy, the process has accelerated because more and more liability is pushed over onto fewer and fewer companies; to make up for the shares of those companies, defendants with increasingly attenuated connections to asbestos are being pulled into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them, just as the companies that came before them in the litigation. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 341-42 (2002).

Absent some change in the way that the courts handle asbestos cases, these problematic trends will only continue.

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[7] Already, some of the newer "peripheral defendants" with attenuated connections to asbestos have begun to declare bankruptcy. *See Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike In Claims*, Vol. 15, No. 23 Mealey's Asbestos Rptr., Jan. 5, 2001.

See Deborah Hensler *et al., Asbestos Litigation in the U.S.: A New Look at an Old Issue* 50 (RAND Inst. for Civil Justice, 2001) (preliminary report) (predicting that "[a]ll of the major asbestos defendants are likely to be in bankruptcy within 24 months.").

II. THE SUBJECT MASS TRIAL PLAN VIOLATES DUE PROCESS AND WILL WORSEN THE CRISIS.

It is against this backdrop that the instant Petition for a Writ of Certiorari should be evaluated. Mass aggregations of asbestos claims, such as the subject West Virginia plan, not only raise serious constitutional due process problems, they also represent unsound public policy because they worsen the asbestos litigation domino effect.

Undoubtedly, the West Virginia court's trial plan is well-intentioned. As former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. has explained, courts in West Virginia and elsewhere may view "mass joinder" and "jumbo" consolidations as a quick way to resolve the worsening asbestos litigation problem. *See* Mallett Testimony at 6 ("Think about a country circuit judge who has dropped on her 5,000 cases all at the same time . . . . The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder."). The Supreme Court of Appeals of West Virginia has itself acknowledged that the lack of an administrative or legislative solution to the litigation "has effectively forced the court to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active docket." *State ex rel. Appalachian Power Co v. MacQueen,* 479 S.E.2d 300, 304 (W. Va. 1996). The trial plan

challenged here is certainly "innovative" and "non-traditional."

The February 26, 2002 Trial Scheduling Order entered by West Virginia Circuit Court Judge Martin Gaughan calls for a September 23, 2002 mass trial to decide the liability of hundreds of defendants to approximately 8,000 plaintiffs in a decisive "asbestos Gettysburg." The first phase of the trial will be composed of three trials of three different groupings of defendants: premises owners, employers, and manufacturers (this group includes Petitioners and over a hundred other defendants). Each of these trials is supposed to determine the alleged "fault" of the many defendants in the group. *See* Appendix Accompanying Mobil's Petition for a Writ of Certiorari at 26a. There will be virtually no opportunity for any defendant to contest the individual claims against it. As stated in the Petition:

> A defendant will not, for example, have any opportunity to show that the claims against it have no logical relationship to the claims made against other defendants, or to demonstrate that the tremendous differences among defendants will be lost during a mass trial. And defendants will have no opportunity to show that the particular claims have no connection to West Virginia, so that application of West Virginia law is precluded by established due process principles.

Pet. for a Writ of Cert. at 2.

The "fault" phase will be followed by the determination of punitive damages issues – before any determination of causation or injury. For any defendant whose conduct gives rise to punitive damages liability, the jury will set a "punitive damages multiplier" – that is the number by which any subsequent award of compensatory damages should be multi-

plied to arrive at a punitive damages award.[8] Causation and compensatory damages will be decided only after the fault phase is completed.

One its face, the mass trial plan "so departs from [the] accepted norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). The plan also is in clear conflict with decisions by the United States Court of Appeals for the Second and Fifth Circuits. Those courts have held that due process does not permit the overbroad aggregation of widely disparate claims without any review for commonality or risk of prejudice to the litigants. *See, e.g., Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997). *See also Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992); *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996); *Union Pac. Res. Group, Inc. v. Hawkins*, 51 S.W.3d 741, 7459 (Tex. App. 2001). As the Second Circuit stated in an asbestos case, "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness.").

It is apparent that the West Virginia plan assumes that the otherwise confusing trial process will be simplified, and that post-trial review will be precluded, by the forced settle-

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[8] *See In re Asbestos Litig.*, Civ. Action No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va. Aug. 12, 2002) (transcript of hearing before Judges Arthur M. Recht, Booker T. Stephens, and Alan D. Moats).

ment of large numbers of claims. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ("legalized blackmail"). The threat of potentially massive punitive damages liability is further evidence of the mass trial plan's coercive intent.[9] Using such leverage to force large block settlements of cases is certainly a quick way to clear lower court's docket, but the Constitution does not permit courts to trample over litigants' due process rights in this fashion. In our civil justice system, the ends do not justify the means. This basic fact was at the core of this Court's decisions in *Amchem*, 521 U.S. at 629 (invalidating proposed class action settlement of thousands of asbestos claims because the settlement failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure), and *Ortiz*, 527 U.S. at 846 (relying on constitutional concerns as well as Rule 23 to invalidate proposed settlement).

While the protection of fundamental due process rights alone provides ample reason for this Court to grant the subject Petition for a Writ of Certiorari, compelling public policy concerns also supports the issuance of a Writ. The his-

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[9] Imposition of punitive damages in today's asbestos litigation environment is especially irresponsible, as both the Third Circuit Court of Appeals and the Judicial Conference have stated. Punitive damage awards help speed asbestos defendants down the path to bankruptcy and threaten the availability of funds needed to compensate sick claimants. *See Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993); Judicial Conference Report, *supra*, at 32. *See also* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001).

tory of the asbestos litigation makes clear that bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains. *See* Eskridge Testimony, *supra*, at 39-40. In fact, such procedures have made the litigation dramatically worse. *See* Schwartz & Lorber, *supra*, at 248. They encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants. *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 278 (2001) ("the very strategies courts have devised to deal with such claims facilitate the bringing of more mass tort claims"). As one West Virginia trial judge involved in asbestos litigation has ruefully acknowledged:

> I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.

In re Asbestos Litig., Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (transcript of hearing before Judge John A. Hutchinson). *See also* Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts – View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

III. THE INSTANT PETITION SHOULD BE GRANTED.

Many of the issues that have worsen the asbestos litigation crisis are traditional matters of state common law that

are not frequently reviewed by this Court. But, this Court has not been hesitant to weigh in on particular issues where the federal role is clear. For example, the Court has been accepted review of asbestos cases involving federal statutes or rules. *See, e.g., Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) (declining to recognize medical monitoring as a cause of action under the Federal Employers' Liability Act ("FELA")); *Amchem, supra*; *Ortiz, supra*. This term, the Court in *Norfolk & Western Ry. Co. v. Freeman Ayers et al.*, No. 01-963 (U.S. 2002), will decide whether FELA plaintiffs must follow the accepted common law requirement that emotional injuries, such as fear of developing cancer in the future, are compensable only if manifested in some objective form, and whether full joint and several liability applies in FELA cases. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12. Safeguarding due process rights is another important role for this Court, and one that the Court is perhaps uniquely situated to handle.

With regard to the *Ayers* case, this action must be viewed as a necessary companion. Otherwise, whatever guidance this Court gives to state common law courts through its *Ayers* opinion will be substantially undermined. The most clear and sound rules will not matter if state courts are permitted to adopt procedural shortcuts that deny litigants the fair opportunity to have those rules applied at trial and subject to post-trial review.

* * *

Ultimately, as this Court and others have recognized, only Congress can provide a comprehensive national solution to the asbestos litigation crisis. *See Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos

cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted).[10] But, until such legislation is enacted, this Court should do everything it can to address issues in the litigation that threaten constitutional rights. This is such as case. This Court should grant the Petition and insist that lower courts respect due process and return to sound rules in asbestos cases. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals noted nearly a decade ago, courts must begin to be part of the solution:

> It is time – perhaps past due – to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. * * * It is judicial paralysis, not activism, that is the problem in this area.

Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993).

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[10] *See also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (internal citation omitted); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 425-26 (W. Va. 2002); *State ex rel. Appalachian Power Co. v. MacQueen, III*, 479 So. 2d 300, 304 (W. Va. 1996); Judicial Conference Report, *supra*, at 3 ("The Committee firmly believes that the ultimate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

CONCLUSION

For the foregoing reasons, *amicus curiae* Coalition for Asbestos Justice, Inc. requests that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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No. 02-132

IN THE

Supreme Court of the United States

MOBIL CORPORATION AND
HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING DEVELOPMENTS OCCURING AFTER THE FILING OF OUR BRIEF IN OPPOSITION

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RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING DEVELOPMENTS OCCURING AFTER THE FILING OF OUR BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.8, respondents make this submission to call the Court's attention to recent developments in the West Virginia trial proceedings underlying the pending Petition for Writ of Certiorari.

As set forth in the attached Affidavit of Theodore Goldberg, the common issues phase of trial has commenced with respect to the product liability and premises liability defendants, and there are only six defendants remaining in those groups, including petitioner Mobil Corporation. All other defendants, including petitioner Honeywell International, have reached final settlements with all of the plaintiffs

in this proceeding, or have been severed from the proceeding. Because so few defendants remain, the common issues phase of trial against the sole remaining premises owner (Union Carbide) and the few remaining products liability defendants (Mobil, Union Carbide, Rhone-Poulenc AG Co., Borg Warner Automotive, Inc., Graybar Electric Co., and Vimasco Corp.) have been consolidated in a single courtroom before a single jury. The trial for the third group of defendants—the employer group—is scheduled to begin in December. There are very few defendants left in that group.

This information is relevant to the Court's consideration of the Petition. Petitioners' first "Question Presented" focuses on the purported unfairness of a "mass trial" of "thousands of disparate product-liability claims against hundreds of defendants." Pet. iii. For example, petitioners argued that such a "mass trial" would "make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way." Pet. 18. It is now clear, however, that there will be no "mass trial" against "hundreds of defendants," and that Mobil will have ample opportunity to present its defenses.

Petitioners' second "Question Presented" is predicated on an alleged "holding" by the West Virginia Supreme Court that "the Due Process Clause permits a state court to apply its own state law to thousands of . . . cases, aggregated for a mass trial, that the court itself has acknowledged have no connection at all to the state." Pet. iii. As respondents pointed out in our Opposition, the challenged decision did not "address [the choice-of-law] issue in any way." Opp. 26. But a choice-of-law ruling was made on August 12, 2002. 8/12/02 Tr. 172-73. If Mobil were to convince the West Virginia Supreme Court that *Phillips Co. v. Shutts*, 472 U.S. 797, 815 (1985), requires further inquiry into the "connection" between the claims made and the law to be applied, such further inquiry would *not*, contrary to petitioners' claims, be "confusing and unmanageable." Pet. 24. Rather,

given the recent drastic reduction in the number of defendants (and, accordingly, premises) implicated here, further inquiry into conflicts of law (if any is necessary) should be straightforward.

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September 27, 2002

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-132

MOBIL CORPORATION and
HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *et al.*,
Respondents.

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

AFFIDAVIT OF THEODORE GOLDBERG

THEODORE GOLDBERG, being duly sworn according to law, deposes and says:

1. I am an attorney licensed to practice law in Pennsylvania and West Virginia, and I am a member of the bar of the United States Supreme Court.
2. I am counsel for a substantial number of plaintiffs in the consolidated actions styled as *In Re: Asbestos Litigation*, pending in the Circuit Court of Kanawha County, West Virginia at No. 01-C-9000 (the "Litigation"), which is the subject of the above-captioned case.
3. I have been closely involved in settlement negotiations in the Litigation, and I have personal knowledge of the status thereof.
4. Following extensive recent settlement activity, only six defendants remain in the "common issues" phase of trial

(the "Common Issues Trial") now underway. Those defendants are: Mobil Oil Corp., Union Carbide Corp., Rhone-Poulenc AG Co., Borg Warner Automotive, Inc., Graybar Electric Co., and Vimasco Corp. All six remaining defendants are products liability defendants.

5. One of the six defendants, Union Carbide Corp., is also the sole remaining premises liability defendant in the Common Issues Trial.

6. Because the sole remaining premises liability defendant is also one of the products liability defendants, the products liability and premises liability trial groups have been consolidated in the Common Issues Trial. The parties completed opening statements in the Common Issues Trial on September 26, 2002, and commenced putting on evidence today, September 27, 2002.

7. On information and belief, Union Carbide Corp. is also one of only a few defendants remaining in the West Virginia employer liability trial group in the Litigation, scheduled for trial in December, 2002; and fewer than 100 plaintiffs remain in that trial group.

8. All claims in the Litigation against Honeywell International Inc., one of the Petitioners in the above-captioned case, have been resolved by settlement. As part of the settlement, counsel for Honeywell International Inc. expressly agreed to withdraw its Petition for Writ of Certiorari herein.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ _____
Theodore Goldberg

Sworn to and subscribed before me
this 27th day of September, 2002.

[SEAL]_____
Notary Public

FILED
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(13)

No. 02-132

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Supreme Court of the United States

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

SUPPLEMENTAL BRIEF FOR PETITIONERS

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September 27, 2002

3 pp

Pursuant to Supreme Court Rule 15.8, Petitioner Mobil makes this submission to alert the Court's attention to recent developments in the mass trial at issue in the above-captioned action. Specifically, the overwhelming majority of defendants subject to the mass trial at issue have settled their claims with the plaintiffs. Petitioner Honeywell has settled all of its claims; petitioner Mobil has not settled its claims, and still seeks this Court's review of the challenged decision on the grounds stated in the petition.

This development does not change the nature of the questions presented in this case. As the petition elaborates, the constitutional violation occurred the moment these cases were consolidated for trial without any inquiry into commonality and prejudice. The fact that many defendants have settled since then, rather than undergo this patently unfair mass trial proceeding, simply confirms the importance of that threshold inquiry. Indeed, petitioners anticipated in their petition that the court below's decision to dispense with any inquiry into commonality and prejudice would have the effect of coercing massive amounts of settlements, regardless of the merits of plaintiffs' claims. That has proven to be true.

In any event, any inquiry into commonality and prejudice would have important consequences on this case even today. There are still six defendants left in this mass trial, including Union Carbide; yet no court has inquired into the fairness of trying Union Carbide's liability as a premises owner and manufacturer together with petitioner Mobil's liability as a manufacturer.

Finally, there are still thousands of plaintiffs with claims against the remaining defendants, and defendants have been given no opportunity to challenge the application of West Virginia law to their claims. And, of course, West Virginia law will be applied throughout all of Phase One, despite the fact that thousands plaintiffs have no connection to that State.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. THIS COURT HAS JURISDICTION TO REVIEW THE FINAL DECISION BELOW. 1

II. THE DECISION BELOW APPROVES A MASS TRIAL WITHOUT THE NECESSARY INQUIRY INTO COMMONALITY AND PREJUDICE. 3

III. THE DECISION BELOW APPROVES APPLICATION OF WEST VIRGINIA LAW TO CLAIMS WITH NO CONNECTION TO THE STATE 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Bd. of Educ. v. Super. Ct.,
448 U.S. 1343 (1980) 3

Bullington v. Missouri,
451 U.S. 430 (1981) 2

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 2

Hudson Distrib., Inc. v. Eli Lilly & Co.,
377 U.S. 386 (1964) 2, 3

Madruga v. Super. Ct.,
346 U.S. 556 (1954) 3

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 7, 8, 9

Weston v. City Council,
27 U.S. (2 Pet.) 449 (1829) 2

State ex rel. Allman v. MacQueen,
551 S.E.2d 369 (W.Va. 2001) 5

State ex rel. Appalachian Power Co. v. MacQueen,
479 S.E.2d 300 (W. Va. 1996) 10

STATUTES & RULES

28 U.S.C. § 1257 ..... 2, 3

W. Va. Code § 23-4-2 8

W. Va. T.C.R. 26.01 ..... 3, 4, 5

OTHER AUTHORITIES

Robert L. Stern, *et al.*, *Supreme Court Practice*
(8th ed. 2002) 2

REPLY BRIEF FOR PETITIONERS

Respondents' principal argument against certiorari is that the court below did not actually decide the questions presented to it, and that, even if it had, its opinion would be unreviewable by this Court. Respondents are wrong.

Respondents attempt only a half-hearted defense of the indefensible proceedings below. It is the same defense advanced by the West Virginia court: that whatever their shortcomings, mass proceedings like this one are the only way to dispose efficiently of thousands of asbestos claims. Br. in Opp. ("Opp.") at 4 & n.2; App. to Pet. for Cert. ("App.") at 11a-12a. Even on its own terms, that claim is wrong: asbestos plaintiffs with actual injuries have sided *with petitioners* in this case, arguing that West Virginia's approach systematically under-compensates the sickest of the plaintiffs. *See* Br. *Amicus Curiae* of the Unofficial Comm. of Select Asbestos Claimants ("SAC") at 4, 7. More important, efficiency is the wrong benchmark when constitutional rights are at stake. The Court has made clear that the exigencies of the asbestos-litigation crisis cannot justify profound distortions of the civil justice system that are inconsistent with fundamental fairness. This case is no exception.

I. THIS COURT HAS JURISDICTION TO REVIEW THE FINAL DECISION BELOW.

The Court's jurisdiction here is plain. Petitioners' request for a writ of prohibition and/or mandamus was a separate proceeding before the West Virginia Supreme Court. The state court's decision to deny the writ is "final" as to that pro-

proceeding and hence reviewable under § 1257.[1] This straightforward jurisdictional rule is well established and uncontroversial. As the leading treatise explains:

> Applications for [writs of prohibition, mandamus, and *quo warranto*] are often filed in state courts as independent cases, even though they relate to a pending lawsuit. Such proceedings may be carried forward to conclusion before the primary litigation has come to an end. To be final for purposes of § 1257(a), the state court judgment must conclusively determine the *right of the applicant to the writ sought.*

Robert L. Stern, *et al.*, *Supreme Court Practice* 159 (8th ed. 2002) (emphasis added). The Court has often invoked this principle, in a variety contexts, to exercise jurisdiction. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) (double jeopardy claim); *Hudson Distrib., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) (declaratory judgment); *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 452 (1829) (challenge to local tax).

Respondents' robust defense of the final judgment rule *see* Opp. 12-14, is thus entirely beside the point. Petitioners, who seek review of a judgment that is final under § 1257, have no occasion to challenge that rule. Nor, contrary to respondents' suggestion, do petitioners need or seek any exception to the rule. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), which describes the rare circumstances in which the Court may review a *non*-final state judgment, Opp. 15 n.4, is of no relevance to this case.

Respondents actually join issue with petitioners only on their reading of "[t]wo of the three cases" cited in the peti-

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[1] The state court's decision also decides the merits of petitioners' federal constitutional claims. *See, e.g.*, App. 9a-14a (rejecting necessity of inquiry into commonality and prejudice on merits); 9a ("merits" determination given most substantial weight in deciding whether writ should issue). There is no basis for respondents' passing suggestion that the decision below presents "no important issue of federal law." Opp. 12.

tion. Opp. 14. According to respondents, those two cases are limited to their facts, and hold only that determination of a writ of mandamus is final if it *also* determines another, separate proceeding – the underlying trial court action. *Id.* But neither case invokes any such "two-for-one" requirement for finality. Rather, like all the cases cited in the petition and this brief, they clearly rest on the principle described above: that writ actions are separate proceedings, so that decisions denying writs are final for purposes of § 1257. *See, e.g., Bd. of Educ. v. Super. Ct.*, 448 U.S. 1343, 1346 (1980) ("petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the [state] Supreme Court's judgment"); *Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *see also Hudson Distrib.*, 377 U.S. at 389 n.4 ("The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court [denying writ] nonfinal.").

II. THE DECISION BELOW APPROVES A MASS TRIAL WITHOUT THE NECESSARY INQUIRY INTO COMMONALITY AND PREJUDICE.

1. Respondents' principal argument is that the court below did not forgo inquiry into whether the claims in question have enough in common to justify their aggregation for trial. According to respondents, that inquiry was undertaken when the court made its initial referral of all West Virginia asbestos cases to the mass litigation panel ("MLP") under Rule 26.01. Opp. 16. Respondents are wrong.

In support of their position, respondents offer a lengthy description of the administrative proceedings conducted prior to the November 2000 referral. Opp. 7-8, 16-18. But nowhere do they cite a single statement by any West Virginia judge finding that the thousands of cases transferred to the MLP have enough in common to justify a mass trial, or that

they can be tried together without unduly prejudicing the defendants. That is not an oversight. There is in fact no such finding, because the propriety of a mass trial was not remotely at issue during the administrative referral proceeding.

At issue then was simply whether the cases should be transferred to the MLP for proceedings consistent with Rule 26.01. Rule 26.01 itself says nothing at all about mass trials, and nothing to suggest that transfer to the MLP will lead to a mass trial rather than, say, a routine consolidation for pretrial discovery. *See* Pet. for Cert. ("Pet.") at 6; App. 36a. Indeed, the presiding judge confirmed that the referral inquiry under Rule 26.01 did not presuppose any mass trial: "I don't mean that by putting this litigation in the hands of the Mass Litigation Panel that what I would do is throw together one big monster trial. I'm not sure that anybody wants that . . . ." Tr. of Hr'g at 12, *In re Asbestos Litig.*, Cir. Ct. of Kanawha Cty., W. Va. (Mar. 1, 2000) (statement of Judge MacQueen). In short, referral to the MLP is not the equivalent of a referral for mass trial, and any "commonality" inquiry associated with that referral is not equivalent to a finding that upwards of 8,000 cases filed against 250 defendants have enough in common that they may be *tried* together. *See* Pet. 15 n.16.[2]

The subsequent proceedings in West Virginia confirm this obvious point. The trial judge announced, *after* the referral, that he would make the traditional findings before he consolidated even two asbestos cases for trial, *see* Tr. of Hr'g at 98, *In re Asbestos*, Civ. Action No. 01-C-9000 (Cir. Ct. Kanawha Cty., W. Va. Feb. 12, 2001), and on May 23, 2001, he entered a "master plan" rejecting a mass trial. Pet. 7. On July 6, 2001 – more than seven months *after* the initial refer-

[2] Respondents' suggestion that some defendants consented to a mass trial during the referral proceeding, Opp. 17, badly misrepresents the record. Petitioners did consent to the initial referral, but – in keeping with the assurances of the presiding judge – only with the express proviso that referral would *not* entail a mass trial. *See* Mobil Corp.'s Resp. to Certain Pls.' Mot. for Mass Trial at 2, *In re Asbestos Litig.*, Civ Action No. 01-C-9000 (Cir. Ct. Kanawha Cty., W. Va. Mar. 30, 2001).

ral – the West Virginia Supreme Court refused to review constitutional claims associated with mass trial procedures on the ground that "*no decision has been reached as to whether mass trials will be held or not.*" *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 373 (W. Va. 2001) (emphasis added). There is no way to square this history with respondents' contention that the referral was based on a finding of sufficient commonality to support a mass trial.

In fact, it was not until the Trial Scheduling Order of September 6, 2001, that any West Virginia court held that the cases referred to the MLP would be aggregated for a mass liability trial. Pet. at 7. That decision was unaccompanied by any findings of commonality. Instead, it was accompanied by findings of a *lack* of commonality: Judge Gaughan held that it was the myriad factual *differences* in the cases referred to the MLP that precluded their efficient resolution by "small-group" trials. *See* 9/6/01 Report at 2 ("multiple defendants and their defense attorneys, varying exposures to asbestos and different theories of liability [make it] futile to continue to pursue small all-issue trials").[3]

And no West Virginia court has inquired since then into whether there is enough commonality in the claims of 8,000 plaintiffs against 250 defendants to support a mass trial, or whether defendants would be prejudiced by such a remarkable undertaking. The court below expressly abandoned that inquiry, ruling that Rule 26.01 "supersedes" the ordinary standards that govern aggregation for trial, App. 9a-14a – an unequivocal holding that respondents nowhere address.

Nor do respondents appreciate that an inquiry into *prejudice* is a distinct requirement of the Due Process Clause. Even if respondents' characterization of the initial referral order were accurate – which it decidedly is not – it would on

[3] The September 6, 2001 order aggregated for mass trial all asbestos claims filed up to that date. Respondents attempt no explanation for how a referral inquiry undertaken in November of 2000 could consider the commonality of claims filed almost a year later.

respondents' own account encompass only the necessary finding of commonality. Respondents make no effort at all to suggest that any West Virginia court has ever considered whether defendants will be prejudiced by this extraordinary mass trial – a failure that by itself conflicts with other courts' decisions and clearly violates defendants' due process rights. *See* Pet. 13-15, 17; *see also* Mem. of DaimlerChrysler Corp., *et al.*, in Supp. of Pet. at 6-7.

2. The court below approved a mass trial to decide at one time the "fault" of each of hundreds of differently situated defendants – including "whether and for what time period any defendant manufacturers sold or distributed a defective asbestos-containing product." App. 26a. Respondents claim that the issue is premature because the precise "common issues" to be put to the jury had not yet been determined when the court reached its decision. Opp. 19. That objection misunderstands the nature of the due process violation claimed. Petitioners' position is that the due process violation inheres in *any* effort to determine the "fault," so defined, of hundreds of defendants as to thousands of plaintiffs in one proceeding without first inquiring into whether there is sufficient commonality to aggregate those claims, and whether defendants will be unduly prejudiced. Pet. 18-19 & n.19.[4] The court below disagrees. App. 9a-10a. That issue is sharply and cleanly presented for this Court's resolution.

3. The ruling of the court below is in conflict with decisions of other courts. Pet. 13-15. Respondents attempt at length to distinguish those cases on their facts, Opp. 21-25, but never once quarrel with the proposition for which the petition cites them: that in jurisdictions outside West Virginia, an inquiry into commonality and prejudice is understood to

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[4] Contrary to respondents' characterization, Opp. 19, it is not petitioners' position that an aggregated trial of asbestos claims can never be conducted consistent with the Due Process Clause. Rather, it is that any aggregation for trial must be preceded by an inquiry into commonality and the potential for prejudice.

be a requirement of due process. It is that principle that creates the conflict with the West Virginia court's decision to dispense with such an inquiry.

Instead, respondents speculate that none of cases cited forecloses the aggregation at issue here. *Id.* We think any court conducting the necessary inquiry into commonality and prejudice would reach precisely the opposite conclusion.[5] But that is not the point. The point is that a court cannot, consistent with due process, refuse to even conduct the inquiry. That is the principle for which those cases are cited – and that is the point respondents never address.

III. THE DECISION BELOW APPROVES APPLICATION OF WEST VIRGINIA LAW TO CLAIMS WITH NO CONNECTION TO THE STATE.

1. Respondents argue that the decision of the West Virginia Supreme Court does not "address [the choice-of-law] issue in any way." Opp. 26. In fact, the decision does more than address the issue; it effectively and expressly approves the application of West Virginia law.

Defendants argued below that without pretrial discovery, they would have no opportunity to invoke the rule of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), against application of West Virginia law to claims without any connection to the State. The court nevertheless denied defendants even minimal pretrial discovery. Pet. 22-23; App. 15a-16a & n.18. That ruling is logically and necessarily a holding on the substantive choice-of-law question, as well. If defendants cannot discover where a given plaintiff resides or was exposed to asbestos, then they cannot make a *Shutts* challenge to application of West Virginia law – which means that forum law applies as the default choice to all of the aggregated

[5] Nor do the West Virginia and Maryland cases cited by respondents, *see* Opp. 4-5, suggest that traditional practice has evolved to permit aggregations like this one. A trial determining "what asbestos is" and the "state of the art" available to first-generation asbestos defendants cannot be compared to a trial to determine the "fault" of 250 defendants.

claims. Pet. 22-23. And this is so despite the fact that thousands of those claims have no connection whatsoever to West Virginia. App. 22a (Maynard, J., concurring).

Respondents elide this problem altogether, focusing instead on the petition's citations to page 7a of the appendix. Opp. 26 & n.10. What appears there is confirmation of the West Virginia Supreme Court's choice-of-law holding: in the one instance in which it was necessary to identify a particular statute – the statute that would apply to the claims of all employees against all employers, regardless of their location – the court below approved the trial court's selection of the *West Virginia* Code, § 23-4-2.

If further confirmation were needed, it was provided at the August 12, 2002, trial court hearing. Contrary to respondents' contention, that hearing did not mark an initial choice-of-law ruling. Instead, the judge – in remarkably candid terms – made clear his understanding that he was following the dictates of the West Virginia Supreme Court:

> *We are not going to change anything* other than . . . fracturing the deliberate intent cases. We understand the argument made regarding choice of law. We understand that there may be plaintiffs that absolutely have no nexus whatsoever. I don't know. But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of the trial . . . and only West Virginia law.

Tr. of Hr'g at 172-73, *In re Asbestos*, Civ. Action No. 02-C-9004, (Cir. Ct. Kanawha Cty., W. Va. Aug. 12, 2002) ("8/12/02 Tr.") (emphasis added).

2. Respondents also argue that *Shutts* never comes into play here at all because petitioners have not shown both the specific state laws that should apply in lieu of forum law and the conflict between those laws and West Virignia law. Opp. 28. Or, put differently, a state court may opt out of the constitutional regime established by *Shutts* by refusing the dis-

covery needed to make the showing respondents describe. But *Shutts*, of course, is not limited to state proceedings in which defendants are afforded discovery before trial. On the contrary, *see* Pet. 23, the holding below conflicts with many cases requiring that aggregated proceedings include an individualized choice-of-law analysis.

Respondents also emphasize the fact that any choice-of-law holding below applies only to the initial "fault" phase of the trial. Opp. 27, 28. But a *Shutts* violation may not be overlooked simply because it is confined to one phase of a mass trial. Indeed, the federalism concerns underlying *Shutts* will be sharply implicated during the fault phase of this trial, during which West Virginia law will be applied to issues – like punitive damages, foreseeability, and the operation of workers' compensation statutes – on which there are substantial and important differences among the States. *See* Br. of 3M Co. as *Amicus Curiae* at 11-14; Br. of Resp'ts in Supp. of Pet'rs at 22-27; Pet. 26.

* * *

It is too late in the day to suggest, *see* Opp. 15-16, that a defendant with a strong case on the merits has nothing to fear from a mass trial like this one. Respondents make no effort at all to come to terms with the fact, now amply documented, that mass proceedings generate intense pressure to settle even meritless claims. Pet. 28-30; *see also* Br. *Amicus Curiae* of the Chamber of Commerce of the United States & the Am. Chemistry Council at 13-17 (effects of pending asbestos claims on defendants' stock prices and access to capital).

That pressure becomes virtually irresistible when, as here, the only alternative to settlement is a patently unconstitutional proceeding that offers no meaningful opportunity to present an individual defense to the jury, promises "punitive damages multipliers" assessed before any finding of injury, and threatens causation and damages findings based on statistics, not trials. Pet. 29-30. It is no surprise that none of the claims aggregated for trial in *State ex rel. Appalachian*

Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996), the prior proceeding much touted by respondents, ever proceeded to a final judgment; all were settled. 8/12/02 Tr. at 109. In fact, no asbestos case consolidated for mass trial in West Virginia has *ever* proceeded to final judgment. Tr. of Hr'g at 59, *In re Asbestos*, Civ. Action No. 01-C-9000, 99-C-183REW (Cir. Ct. Kanawha Cty., W. Va. Mar. 16, 2001).

Coerced settlements of meritless claims are not only unfair to defendants; they are also adverse to the interests of truly ill plaintiffs. For that reason, lawyers representing cancer victims have taken the extraordinary step of filing an *amicus* brief in support of petitioners here. As they explain, cancer claimants are the "ultimate losers" when defendants are forced by mass proceedings to settle meritless cases: "[Such] consolidations force defendants to pay exorbitant sums to settle cases involving no injury, thus inviting the filing of more unimpaired cases, thus causing another round of bankruptcies, and ultimately thus ensuring that cancer claimants are uncompensated." SAC Br. at 7.[6]

The other result of coerced settlements, of course, is that post-trial review becomes practically unavailable. If defendants like petitioners are forced to settle, then they will lose their only opportunity to bring their constitutional claims before the Court. And the upshot will be that the very coerciveness of the unconstitutional proceedings below will forever insulate them from judicial review. Immediate review by this Court is both appropriate and necessary.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[6] Nor would deferred review, assuming it were available, be in the interest of sick plaintiffs. Sick claimants should not be required to suffer through an obviously unconstitutional mass trial and protracted post-trial appeals, only to be begin again when the verdict is ultimately set aside.

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